

T H E  
T H I R D P A R T  
O F T H E  
R E P O R T S

O F  
**Edward Bulstrode**

Of the INNER-TEMPLE, Esq;

Of divers R E S O L U T I O N S and J U D G E M E N T S,  
given with great Advice, and Mature Deliberation, by  
the Grave and Learned Judges and Sages

O F T H E  
L A W V.

Of divers and sundry Cases and Matters in LAW,  
With the *Reasons and Causes* of their said *Resolutions*  
and *Judgments*, given in the Court of *Kings-*  
*Bench*, in the time of the late Reign of

K I N G J A M E S I.

And the beginning of

<sup>o</sup> K I N G C H A R L E S I.

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*Ἐν τοῖς νόμοις ἐστὶν ἡ σωτηρία τῆς πόλεως.*

*In legibus, Civitatis salus consistit.* Aristot. Rhet.

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The Second Edition.

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L O N D O N,

Printed by the Assigns of *Richard and Edward*  
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REPORTS  
OF THE  
COMMISSIONERS OF THE  
LAND OFFICE

OF THE  
LANDS BELONGING TO  
THE CROWN

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L. O. V. D. W.



TO THE  
RIGHT HONOURABLE

*Bulstrode Lord Whitlock.*

*My Lord,*

**T**He continuance of your Lordship's more than ordinary Favors, joyn'd with your Lordship's Encouragements and Commands of my Proceeding this way, do justly challenge, not onely the continuance of my thankfull Acknowledgement, but of this Dedication likewise; which appertains to your Lordship (besides my particular Obligations and Respects) in some propriety, in regard you are a most eminent Justiciary amongst us. *Inter Viburna Cupressus.* And which is more, your Lordship hath added to your place, a great affection to the Professors of the Common Law, and a great zeal to the publick Good, regulated by a perfect Judgement, which last (at present) I might wish less, that your Lordship might the less exquisitely censure these my weak and imperfect Labors; which yet I hope your Lordship will favorably accept, they being bestowed for the necessary use of the Professors of the Law; in the study and practice whereof, I have spent so many years, that I am now, *In*

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*The Epistle*

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*Vergenilus Annis*, wherein time grows so precious with me, that I fear I shall not be able to finish what I first intended, when I began this Work: But whatever either is, or shall be written, (during your Lordships time) concerning the Law, your Lordship justly deserves a Propriety in it, having been so zealous a Defender of it, that it may be truly said, The Law is more beholding to your Lordship, than you to the Law. And indeed, your Lordship could never have undertaken a more Honourable Defence, for without Laws the Commonwealth will, like a melted Vessel, run into a lump of confusion, and disorder. We should be like a Ship floating in the Sea without a Pilot, or rather like the Sea it self without Banks; nay, ~~is like~~ *ὡς ἡ θάλασσα*, like Fishes, the greater would devour the less: We should be like those Barbarous *Scythians*, who did, says *Basil*, φιλονεικίαν σιδηρῶς κρίνουν, end their Controversies not by the Law, but by the Sword.

*Justinian  
Institur,*

It was an excellent Sentence written from the Emperor *Justinian*, to the Præter of *Laconia*, All things (saith he) which pertain to the well Government of a State, are ordered by the Laws, wherefore whoso would walk wisely, shall never fail, if he purpose them for the rule of his Actions. In the Laws of a Nation consists the safety of a Nation, and therefore the Gates of the *Jewish* Cities, as they were Seats of Justice, so they were the Magazines and Armories of their strength, to shew, that the strength of a Nation does not  
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*Dedicatory.*

more consist in the number of Men and Arms,  
then in the due execution of Law and Justice:  
The Law of a Common-wealth, says Learned  
*Hooker*, is the very soul of a Politick Body, the *Hooker Ec-  
cle, Pol. lib.  
1. fol. 25.* parts whereof are by the Law animated, held to-  
gether, and set on work in such Actions as the  
common good requireth: It is the Rudder by  
which the Vessel of the Common-wealth is steer-  
ed, and it hath a sharp Sword to restrain men  
from Violence and Injustice, that so *formidine pæ-  
næ*, they may learn their duties: And as the Ju-  
dicial Law amongst the Hebrews was a Hedge  
or Fence of the Moral Law, so the Law of the  
Land well executed, is a good guard to the Law  
of God; and though compulsion cannot make  
men truly good, as they ought to be, yet it may  
keep them from being so bad, as otherwise they  
would be: *Major hæreditas venit unicuique no-  
strum, à jure & legibus, quàm à parentibus.* No *Coke 1 part;  
fol. 142.* man is assured he shall either keep his Estate, or  
transmit it to his Posterity, but by the Law, which  
is the Sanctuary of a free Subject, the safeguard  
and defence of his Life and Fortune: The poor-  
est person living, were not the Law his refuge,  
would be yet more unhappy than his present  
condition can make him, for be he never so mean  
he is within its care, and the greatest Person li-  
ving is not exempted from its Power: And  
therefore that was very praise-worthy which *An-  
tigonus* the Great replied to one of his Favourites,  
who would needs perswade him, that whatever  
Kings



Kings had a mind to was lawfull; he told him, true it was so, but amongst *Barbarian* Kings, not them that profess Justice. For God hath appointed distinct *Laws* both for Princes and private Men, and Princes have their Judge, who sitteth in Heaven, before whose Tribunal they are accountable for whatsoever abuse or corruption, which the want either of care or conscience, hath bred in them. And that we might not be so much governed by Men as *Laws*, the Wisdom of our *Law-makers* did take care, that most of our *Laws* should be written, to the end, that neither favour nor hatred might approach the Tribunal, nor Judgement be left to the arbitrary will of Man, that Magistrates might know what to command, and People what to obey, that so no man might doe and undoe, bind and loose at his pleasure: And our very Precedents and Reports by which we walk, have onely so much of *Law*, as they have of *Justice*, they and *Law* being both built upon *Reason* and *Justice*, which may be easily made appear to all whose obstinacy is not above their fear.

Hooker Ecl.  
Pol. fol. 47.

As every good and perfect gift, so this very gift of good and perfect *Laws* is derived from the Father of Lights, to teach us a reason why just and reasonable *Laws* are of so great use in the World; and that Laws apparently good, are (as it were) things copyed out of the very Tables of that high everlasting Law: The Laws which the very Heathens did gather to direct their actions

*Dedicatory.*

ons by, so far forth, as they proceeded from the light of Nature, God himself was both the Author and Writer of them in the Tables of their hearts. How much more then is he the Author of those Laws, that are made by persons zealous of his Service, and which have been drawn as near as may be to that first Original, that supreme highest Law which he gave us? And if we do but seriously consider, how our Ancestors, after the tryal of many Ages, have grown up happily under our Laws, wherein their Fathers and themselves were born and bred up: Laws which have been weighed and allowed not by the wisdom of a narrow age, but by the experience of above a thousand years; and if men were but likewise willing to learn how many Laws their actions in this life are subject unto, and what the true force of each Law is, all the disputes and contumelious Invectives against our Laws, would have dyed the very day they first brought forth. But it is a great deal easier for men by the Law to be taught what to do, than instructed how to judge as they should do of the Law. For *Aristotle* himself *Aristot. Eth. l. 10.* was ready to acknowledge, that τὸ κρίνειν ὁ νόμος μέγιστον, soundly to judge of Laws, was the weightiest thing that any man could take upon him: Concerning which, the Learned *Hooker* gives an excellent caution, *Hooker Eccles. Pol. lib. 1. f. 48.* If we will, saith he, give Judgment of Laws under which we live, let the Law Eternal be always before our eyes, which is of principal force to breed in Religious minds; a dutifull estimation

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*The Epistle*

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tion of all *Laws*; and though we perceive not the goodness of *Laws* made, yet since things in themselves may have that which we discern not, we should therefore be very carefull how we speak or judge in the worse sense of them: For when *Laws* are slighted or despised, then are the People oppressed, then disobediences, revolts, violences, and all the Crimes which are the Plague and ruine of a State, are in agitation, whereas the due observation of the Law, and a quiet submission thereunto, cutteth off those enormities which afflict us, and secureth us in the injoyment of those Goods which God hath bestowed on us. A Prince ought therefore never to let the *Laws* fall into dis-esteem, especially those which keep the People in obedience, and which serve to secure them from oppression, and allways to uphold the Dignity of the Professors thereof.

We find it was the Wisdom of the *Roman* State, to admit the Lawyers into their most secret and important Councils, and seldom was any Law made to which they were not called to give their Advice: Nay, History tells us, that *Alexander Severus* the Roman Emperor, never establishd any Law, without the presence and assistance of Twenty the most Renowned Lawyers; and certainly that State found the benefit thereof in its long continuance: and most necessary it is, that to devise *Laws*, which all men shall be bound to obey, nothing be acted therein, but by the deliberation and consent of those that  
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*Dedicatory.*

are to give obedience thereunto. And therefore the constitution of this Nation requireth, that the King should be advised by his Parliament, when ever any Laws or Ordinances are made: And our Laws are those, which publick approbation hath made so, and approbation is not onely given when men personally declare their assent, but when others do it in their names by right originally derived from them: And this is it which makes the People receive the Laws with more submission and willingness, for nothing is so acceptable to them, as that which carrieth the least shew of absolute Sovereignty, and the greatest shew of Liberty: And our Laws do not onely Fortescue, c. 42. favour Liberty, but they are notioned by that very word; for Liberties in *Magna Charta*, signifie Mag. Char. c. 29. the Laws, and in that respect is the great Charter called the Charter of Liberties: And our Laws Bracton, 291, 214. Fleta, lib. 2. c. 48. Britton, 178. in 38 E. 3. c. 4. are called, *The Liberties of England*, because they make men free: And indeed the Law is the onely real Liberty, if we will believe my Lord Coke, 2 *Instit.* 4. But it is not a licentious Liberty which the Law gives us, but a real Freedom, a Freedom from Slavery and Tyranny. And since it is so, is it not much better to judge according to these *Laws*, than out of any mans knowledge, though never so wise; for though he may see clearly, yet the *Laws* see with the eyes of many Ages, with the eyes of all the most able and learned Councillors of State and Judges of our *Land*, they having been compo-

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*The Epistle*

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fed by the most solid wifest Heads of all the ages past : And therefore the greatest Politicians have thought it dangerous to the good of a State to alter any *Laws* without common consent and urgent occasion , or unless the change carry some great alteration with it : *Aristotle* says , It makes Subjects slight Rules and Powers , and doth diminish their Authority : But *Cleon* in *Thucidides*,  
*Thucidides*,  
lib. 3. goes a little farther , affirming , *A City with the worst Laws immoveable, is better than one with good Laws not binding.* And the Common-wealth of *Sicyon*, had not survived the Policies and Estates of all *Greece* besides, but that in 740 years, they never set forth any new *Edicts*, nor went beyond any of their *Laws*. And it is worthy our observation, that in the *Venetian Commonwealth*, those Reforms of Government, those reassumings of State have been never seen, which with infinite Tumults the *Roman* and *Florentine Commonwealths* have so often used : It being the peculiar vertue of the *Venetian Senate* to perpetuate her self in her flourishing *Liberty*, by the punctual observation of her ancient *Laws* : It is therefore certainly an effect of a great Discretion, to preserve the observation of those *Laws*, which had formerly enough in them to remedy any inconvenience in the State. And not to do as King *Francis* the first of *France* did, after he had Conquered *Savoy*, and expelled *Charles* the Second, who was Duke thereof : The new Magistrates substituted by him, gave Judgement in all cases accord-

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*Dedicatory.*

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according to equity, and often against their known Laws, but the Countrey was quickly so weary of it, that they Petitioned the King, that those Judges might no more Judge according to equity, but according to Law: And my Lord *Loke* declaring the dangerous Inconveniencies that happen by changing Laws, does affirm, That all the mischiefs and miserable oppressions committed by *Empson* and *Dudley*, were occasioned by the Statute of 11 *H. 7.* authorizing to hear and determine offences against Penal Statutes, according to discretion, (and not according to the Laws and Customs of *England*) which Statute was afterwards justly repealed, 1 *H. 8. cap. 6.* And in the Preface to the fourth part of his Reports, he says, *That it is an old rule in Law and Policy, that correction of Laws be avoided*; which may be thought a streyn too high, for if our Laws had not been often polished, refined, and added to, where they have not been full to compleat them, they had not gained the perfection they have now attained.

And indeed it is a vulgar error, to imagine that Laws must never be altered, without common consent, and just consideration it ought not to be done, but when there happens any such to be, the alteration of them cannot but be advantageous: It being impossible the first Law-makers should foresee all inconveniencies which might ensue: For as *Mr. Lambart* says, The

Law cannot be such a perfect Rule, as that we may thereby square out Justice in all Cases which may happen, for written Laws must needs be made in general, and grounded upon that which happens for the most part, because no wisdom of man can foresee every thing which time and experience doth beget: There must of necessity therefore, be many times alteration of some Rules of Justice, because the Manners of Men are variable, and the punishment of Crimes may admit of change, according to the disposition of Men and Times. But those Laws that are known Maximes for the common good, ought no more to be changed than the Laws of Nature, for both are equally founded upon Gods Law: 'Tis true, if Man had remained in his Original Integrity, the Laws of Reason had been sufficient to direct each particular person in all his affairs and duties, which now are not sufficient, but require the access of other Laws, now that Man and his Off-spring are grown thus corrupt and sinfull.

When the *Romans* were little better than Shepherds and Herdsmen, 'tis said, a few *Tablets* contained their Laws; but after they came to be Lords of the World, how many thousand Books were written, of the *Roman Civil Law*? In like manner, let us but consider, how much more Traffick is increased here than in former times, how Contracts are  
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*Dedictory.*

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more frequent, and breaches of Trust more common ; how great an Improvement of mens Estates, and how much more deceit and oppression than formerly, and we shall then cease wondering why our Laws run in a larger Channel, and spread into more veins than formerly ; for as Offences gather strength and multiply, so must the Laws, and though they were but few at first, and then sufficient, when men lived in publick Society with harmless Dispositions, yet now when the Injustice of Wicked Men will hardly be kept in with Bit and Bridle, and that mens Iniquities cannot be restrained within any tolerable Bounds, when men are neither constant to their own goodness, nor to their lawless Sins ; and that punishment which hath been sometimes forcible enough to bridle Sin, grows now too weak and feeble ; there is a necessity that as these Mischiefs increase, there should be supplements of Laws to meet with them, and to punish what is amiss. And this is the true reason why our Laws are swell'd into so much a bigger Bulk than formerly ; And if any do complain of the obscurity of our Laws, they must consider, that as we behold the stateliness of Houses with Delight, though the foundation thereof is conceal'd in the Bosom of the Earth : So we may enjoy the use and benefit of our Laws with much comfort, though the Grounds and first Original

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*The Epistle*

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ginal Causes from whence they Sprung be removed from our knowledge: Our Law hath reason every where, though not to every Eye conspicuous: And wise and modest Persons cannot but know, and consider, that at this distance, and after so many Ages, the reason of our *Laws* ought not to be inquired after, but we should rather presume, that those *Laws* and *Customs* which have been tolerated by our ancient Predecessors, did proceed from their mature Wisdom; and that our Fore-fathers have examined and digested the *Laws* much more accurately than we do, who run our selves into infinite disorders, when out of novelty we would abrogate those Ancient *Laws* which experience hath found to be good.

And now, *My Lord*, I have wearyed your patience in justification of our *Laws*; which I think were needless, were they rightly understood, for we cannot justly complain that good *Laws* have been so much wanting unto us, as we to them: To seek Reformation of *Laws*, is a commendable endeavour, but a speedy redress of our selves is for us more necessary, for we have lost much of the ancient Gravity of our Profession; and have degenerated from what we were; it is time therefore for us to return, and to be more cautelous and circumspect, by how much men are more clamorous  
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*Dedicatory.*

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and querulous against us: And the best way to confute the Calumnies of Men, is even our own Integrity, that we endeavour to be pure and clear in our Lives and Professions, and to be principled upon Religion and Conscience, endeavouring to be the best men as well as the best Lawyers: The meanest of which is,

*My Lord,*

From the Black Buildings  
in the *Inner-Temple*,  
November 1. 1658.

*Your Lordships most obedi-  
ent and most Faithfull  
Servant,*

Edward Bulstrode.

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and question. And the best way to  
conserve the substance of them, is even one  
integrity, that we endeavor to be pure and clear  
in our lives and actions, and to be preserved  
upon Religion and Obedience, endeavoring to  
be the best men as well as the best lawyers. The  
interest of which is

That the most

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An Alphabetical

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TERMIN.





## TERMIN. HILLAR.

12 JAC. *Banco Regis.*

The King and Sir *Thomas Waller* Plaintiffs, against  
*Frances Hanger* Widow, Executrix of *George*  
*Hanger* her late Husband, deceased,  
 by Information.

Entred Termin. Pasch. 9 Jac. inter placita  
 Regis, Rot. 163.



**S**ir *Thomas Waller* miles, Capitalis pincerna domini Regis, by his Letters Patents, exhibited an Information against *Frances Hanger* Widow, for detaining of Wilsage, (S.) Eight Tun of Wine; and shews, That the King was seized in his demesne as of Fee, of this ancient duty called Wilsage, ut in jure Coronæ, and that he and all his Progenitors have used to have Wilsage, which is of every Ship, of all Merchants, Aliens, or Denizens, containing ten Tuns of Wine, to have for Wilsage one Tun; and if it contain twenty Tun, or more, to have two Tun, (S.) Unum ante Soleum, and the other deorsum, and this he is to have as a Flower of the Crown: That 28 Novembris, 5 Jac. Two Ships laden with Wines, of the goods of *George Hanger*, did arrive in the Port of London, the one called the *Hopewell*, with 26 Tuns, so that two Tuns of these were due to the King; and the other called the *Desire*, with 22 Tuns of Wine, of which two Tuns were due to the King: That afterwards the other two Ships did arrive also in the Port of London, and that in these four Ships were 124 Tun of Wine, of which eight Tun was due unto the King for Wilsage; that he required these eight Tuns of Wine of the said *Frances Hanger*, to the use of the King; and that she, of the premises not ignorant, seeking the disinheritance of the King, refused to deliver them: Upon this he prayed the advice of the Judges, and to have process against the said *Frances*, who came in, and said by Protestation; First, That the Information was insufficient: Secondly, That Sir *Thomas Waller* was not Capitalis pincerna domini Regis, & pro placito dicit, quod bene & verum est; that the four Ships with Wines did arrive in the Port of London, as is laid in the Information; two of which Ships did arrive in the life time of the said *George* her Husband, and two after his death, and that the said *George* her then Husband, was possessed of these goods, ut de vinis suis propriis, and so being possessed, made her his Executrix, and dyed: Afterwards she being libera famina, accepta super se onera testamenti, did un-

An Informa-  
 tion for Pri-  
 sage.  
 1 Ro. r. 138.  
 2 Bulst. 134.  
 261.  
 Latch. 261.  
 Calch. 33.  
 Mo. 832.

6 Martii,  
1 E. 3. &c.

lade these two Ships, and did take and occupy the Wines, as Executrix; and she also pleaded the Charter of discharge of Writage made, 6 Martii, 1 E. 3. &c. unto the Mayor, Commonalty, and Citizens of London, in hæc verba, (S.) Quod de vinis Civium, nulla prisla fiat, sed perpetue inde essent quieti, and takes a Travers, absque hoc, that these were her own proper goods, and that she had nothing in them, but onely as Executrix of George Hanger her late Husband, with an Averment, that the said George, suit Civis, & liber homo de Civitate London, (S.) of the Company of Cloath-workers; and she also averred, quod Civitas Lon. est antiqua Civitas, Antez. pozated by the name of Mayor and Commonalty: Upon this Plea the Kings Attor. ney-general demurred in Law, upon which the Case was briefly this. (S.) Merchants, Freemen, Citizens, and Residents in London, by the Charter of 1 E. 3. are discharged of the payment of Writage. A Merchant Citizen, and Freeman of London, had four Ships with Wines arrived here in the Port of London, two of them in his life time, and two after his death; after the arrival, and before the unloading of the two first Ships, he made his Wife his Executrix, and dyed; who afterwards unloaded these Ships so arrived, in the life time of her Husband, and also the other two Ships which arrived after his death: The sole question upon this demurrer was, whether she shall be discharged from the payment of Writage for these Wines, or not, by force of the said general grant of discharge of Writage, by the said Charter of 1 E. 3.

9 & 10 Jac.  
B. R. &c.

This Case was long argued at the Bar, in the Terms of 9 and 10 Jac. B. R. And afterwards in Trin. 10 Jac. B. R. this Case was argued by the four Judges, who were then divided in opinion, two against two.

1.

Croke Justice. The question here is, Whether Writage shall be paid for these Wines, or not: In angustiis positus sum, which way to incline my Opinion; but I think, that in this case, Judgment ought to be given for the King, and that Writage ought here to be paid unto him, for these two Ships which did first arrive, but especially for the two last Ships: I am of Opinion, that Hoc privilegium à principe concessum, ought to be taken and construed, benign, largely and amply, and not to be restrained, bene meriti Cives London; this Immunity to be extended to Citizens, Men or Women Citizens, as well to the one, as to the other clearly; Cives utriusque generis, & gratium donum Regis, this was to be to the Citizens of London, being totius Britannia, & regni totius Epitome, that Women are not to be excluded out of the benefit of this Charter, for that they deserve as well as others; so that no disability being in the Woman, but she being integra Civis, is very well capable of this immunity for the Widow of a Merchant Citizen, est civis & civium libertate dotata, and she shall have the same privilege, as well as her Husband, as long as she is resident within the City, she shall be free from payment of Writage. All this I agree: But here relia verificatione, that she is Civis, saith, that she hath these Wines in another right, and takes a Travers that they are not bona sua propria, but that she hath them as Executrix of her late Husband: As to the Privilege here of discharge, the difference will be, where the goods are attached in the life of the Husband, and where after his death; where it is in his life time, and he dies the same day, yet the Discharge shall continue; but here in this Case the same was after his death.

Magna Char.  
4, cap. 9.

Also he which is to take benefit of this Charter, ought not to be inquilinus nec adventitius, he ought to be Civis residents, & commorans incola Civitatis, and so are the words of the Charter of Discharge, made unto them in 1 E. 3. And the King, ex spec. ali gratia, did then grant this Discharge unto the City; and it appears by Magna Charta, cap. 9. quod Civitas London, omnes habeat Libertates suas antiquas, & consuetudines illas.

Also this Writage is an ancient duty in the Crown, and due unto the King, as of common Right, and the same is a Privilege in the Crown, incident unto the King, as a flower or fruit from the Tree, but not so inseparably for

for that he may well grant this immunity to whom he will. A Woman may be a Citizen, but here she is not an Owner as she ought to be.

If a Citizen makes a Foreigner his Executor, who unlades the Wines, clearly he shall not have the benefit of this discharge, for that he here hath them in another right, and the Passage grows due to the King, by the unlading; so that a Foreigner shall not have the benefit of this discharge, nor yet an Executor of an Executor.

If the Goods of a Citizen come to a Foreigner, he is not Civis.

If a Foreigner makes a Citizen his Executor, he shall not have this privilege of discharge from payment of Passage; for these are not bona Civium, as they ought to be, or no discharge; for that he which is to be quit from payment of Passage, ought to be a Citizen, and he ought to have the Goods in his proper, and not in another's right.

Now this Passage at first grew due, a probable reason may be this; for that the King is to scour the Parrow Seas, and therefore he is to have of every Ship, bringing ten tuns of Wine, one tun; and if twenty tuns, or above, then to have two tuns for his Passage; so that this is an Hereditary Right in the Crown.

Another matter is here observable, that formerly, in ancient time, the usual burthen of Ships was but ten or twenty tun, but now, by great Industry, they are made greater, and in this, the great benignity of the King is to be observed, that he doth not extend the payment of Passage, according to the bigness of the Ship, but only to have two tuns out of a Ship, though the same contain forty or fifty tuns, as here it appeared to be; and from hence may be gathered a good caution unto Subjects, ultra debitos limites & fines, not to extend the Kings Charter and Grant, and to doe contrary unto this, is retribuere malum, pro bono.

As to the Charter it self, made in 1 E. 3. and the due construction thereof, Letters Patents of the King ought to be construed, secundum intentionem domini regis, & non ad deceptionem: And the King, quatenus Rex, est Protector legis terræ, & quod rex legi, lex regi, as Bracton observeth, Rex est anima legis, & lex est anima Regis. *Bracton.* Letters Patents are to be construed benign, favourably and liberally; and upon the true construction of this Charter here of discharge, is the main knot and difficulty in this case, pupilla oculi regis Civitas London, and the same is called, Camera regis.

As to the words of this Charter, (S.) De vinis civium nulla prisca fiat, sed inde perpetue essent quieti: Here is Concessio Regis, and who he intended to have benefit by this immunity; and this was not Frances Hanger, but George Hanger, De vinis civium, &c.

Obj. But these are the Wines of a Citizen, and therefore no Passage to be paid for them.

Resp. If none of this could be denyed, it must then be agreed to be so: But these are not now the Wines of George Hanger, nec vina civium, for that George Hanger is not now a Citizen; Non vina George Hanger, for that he in pulvere dormit, and he hath undergone this Sentence, (S.) Cines es, & in Cingre, &c. mors omnia solvit, and now he being dead, he hath no goods, nor is he now a Citizen; he was a Citizen, but now is not, non est spirans, non est inter vivos, & si non est, then non est civis civitatis London: So that here is a double disability in George Hanger; he hath no goods, neither is he a Citizen; and both these ought to concur, otherwise, not capable of this Immunity; he hath goods only in Representation, in the hands of his Executor, which are in Judgement of Law, bona testatoris.

If two Citizens have Wines as in Joynt-tenancy, they conjunctim & divisim, shall have this privilege; otherwise it is if a Citizen and a Stranger have Wines.



11 E. 3. Fitz.  
tit. Execut.  
placito 77.

Here in this Case this Privilege doth not die, but onely quoad George Hanger: As to the Wife, she here saith, that she is libera femina & Civis, whether she shall have this Privilege, or not, is the question. As to this, she shall not have this Privilege, for here she hath not any Wines; she is civis, but she hath not *vina civium*; If she had these Wines in *jure proprio*, then she should have the benefit of this immunity: But here she hath these Wines in the right of another, in *jure mariti*, and therefore she shall not have the benefit of this discharge. Also the Kings grants ought to have such a construction, as not to extend unto a representative person; and to this purpose is the Case in 11 E. 3. Fitz. tit. Executors, placito 77. If a Guardian in Socage hath a Ward, makes his Executors and dies, they do represent his person, as to the goods, but not to have the Wardship; so here in this Case Frances Hanger doth represent the person of her Husband and Testator, as to the goods, to have them, but not as to the privilege of this Immunity and Discharge, given unto him by this Charter; but this benefit doth onely rebound to such a one, who is *omni soli & semper civi*, and such a person is onely to enjoy the same.

Another matter is very material in this Case, (S.) The time when this Writage becomes to be due to the King, this is very material, for that if it be agreed, that the same grows due upon the arrival of the Ship; then for the first, no Writage is to be paid, because they arrived in the life time of George; but for the other two, Writage is to be paid, for that they arrived two Moneths after his death: But as to the certain time when this duty begins, the words of the Record are in this manner (S.) *de qualibet navi, important vina & disonerant inde, so that by the unlading this Writage grows due.*

Trin. 5. Jac.  
B. R. &c.

Trinity 5 Jac. B. R. in Kennicot and Bogens Case, this was agreed, that Writage is not due to the King, untill the Bulk be broken open: If his Executors shall have this benefit of discharge, there would be a manifest inconvenience by this, for if he hath no Executors, then the Ordinary to have this, he being by the Law in the place of an Executor; and so of an Executor of an Executor, being an Executor of the first man, as appears by 19 H. 8. and so in infinit & infinitum, & *indertum*, always in lege reprobatur, and so it shall be in grants of the King, & in *casu concessionis regis, concessionis causa* is to be considered. The discharge here was granted, in regard of the great burthen and travel of Citizens Merchants, and for to encourage them to Merchandize: But George Hanger, *nemo non habet onus*, and therefore not to have the benefit of discharge for these goods.

Magna Charta,  
cap. 21.

If the Wines in these Ships were divided in a *Rationabile parte bonorum*, they shall not have the benefit of this discharge; Magna Charta, capite 21. in *casu privilegii. Nulla carecta dominica, alicujus persona Ecclesiastica, vel militis, vel alicujus domini per ballivos nostros capiatur, &c.* If such a person so privileged dies, this privilege shall not extend to his Executors, for that, as to these personal privileges, the Executor doth not represent his Testator, but onely quoad his Goods, for to have the Administration of them; yet it must be agreed, that this Charter ought to have as ample and beneficial construction, for the Citizens of London, as may be; yet he wistly is to have benefit and advantage of this, ought to be *integre Civis*, and an intire Citizen, as it was adjudged in 4 H. 6. in one Knowls Case a Citizen, and free Exporter of London, removed his household, cum pannis, and did dwell at Britow, but yet kept his Shop in London, and he had a Ship laden with Wines, which was laden in the Port of London, and would have had the benefit of this Charter of discharge of Writage, but it was ruled against him, for that he was not such a Citizen as was capable of this discharge, for that he ought to be *Civis in cola commorans*.

4 H. 6.  
Knowls Case.

14 H. 6. &c.

14 H. 6. A private Act of Parliament: Complaint was made, that the Lord Mayor of London would make Strangers Citizens: It was there declared, that this

this benefit, to be discharged from payment of *Wylage*, did not extend unto such Citizens as were *dorant*, made *freer*, but unto those Citizens onely which are *commorant incolant*; and resident within the City; here the Plea is, that the Wife, the Defendant, est & sit libera femina, but not Civis, and therefore the Plea not good.

In 43 Eliz. a private Report, one Sacheverils Case, They were not Pastors of Families, but they had taken Chambers in the City, and were *freemen*, and subject to *scot and lot*, yet they could not have the benefit of this immunity, for that they were not in *cola*.

If a Citizen of London doth Merchandize with another, he shall not have the benefit of this discharge.

If the King grant to one all *Amerciaments*, he shall not have *royal Amerciaments*, for the Kings grants ought to have a favorable construction.

This Case now here in question, est *casus omissus & cessante causa* (George Hanger the Testator being dead) cessabit & effectus, (S.) The discharge of payment of *Wylage*; but if the bulk of the Ship was opened before his death, his Executors afterwards may well take and carry the *Wine* without the payment of *Wylage* for the same, because the same was once discharged by the opening, in the life time of the Testator; for no *Wylage* is due before the bulk of the Ship be broken open, and then the same is due.

This Privilege of immunity is here knit to the person of the Testator, & *mori cum persona*, and now these *Wines* are not bona Civium, and George Hanger the Testator, non est Civis, sed nunc est mortuus, and these *Wines* are not his goods; for as one well observeth, touching the disposition of goods by one,

*Da tua, dum tua sunt, post mortem tunc tua non sunt.*

And our Ancestors did not make so large a Construction of this Charter of the King, being made *civibus London* generally, as to extend the same to go unto every Citizen, but he ought to be such a Citizen, who is Civis, to all purposes and intents, whertofe he is not to have any benefit of this discharge from payment of *Wylage*, and the same is not to be extended unto a representative person.

And so this case here, being *casus omissus*, the Defendant is not by this Charter to be discharged from payment of *Wylage* for these *Wines*, but ought to pay the same; and so upon the whole matter, Judgement ought to be given for the King.

VWilliams Justice. Upon the exposition of this Charter of discharge of *Wylage*, granted 1 E. 3. to the City of London, Frances Hanger the Defendant, ought to be discharged from the payment of *Wylage* for these *Wines*.

In 5 E. 3. and 6 E. 3. this matter as touching *Wylage* is largely argued, betwixt the King and the Bishop of York; without all question the King may well grant away this Immunity and discharge of *Wylage*; and so it is of another Inheritance, as Licenses for Transportation, without payment of Custom, as appears by 30 H. 8. Dyer, fol. 43. plaito 22, 23, 24. and 34 H. 8. Dyer, fol. 52. plaito 1. License for carrying of Bell-mettle out of the Realm, 21 E. 4. fol. 7. The King grants unto the Mayor of Norwich, to be Incorporated by the Name of Civibus, and this a good Name of Incorporation, 7 E. 4. fol. 14. the King grants *prohis hominibus* Ville de Dale, and this a good Name of Incorporation; and so here in this Case, the grant of discharge from payment of *Wylage*, being made *civibus London*, is good.

The King may grant away his Inheritance, as Taxes or Tallages, 21 E. 4. 21 E. 4. f. 49. fol. 45, 48. The King may grant unto one to be discharged from the payment of 48.

Taxes, Subsidies and Fiftens; and so he may grant unto one, that he shall not be charged with the Collection of *Wethes*, 39 E. 3. fol. 35. touching the Kings grants;

43 Eliz. Sacheverils case.

30 H. 8. Dyer, fol. 43. &c.

7 E. 4. fol. 14.

Coke 5 pars, Grants; and Coke 5 pars, fol. 107. In Sir Henry Constables Case; one prescribes to have Royal fishes, as Whales, Porpoises; so this Grant, as it is here made, is good.

It is here confessed, that the Husband of the Defendant was a Freeman, and a Citizen of London, at the time of the lading of the Ships, and divers years before he had these goods, so that he was a person well capable of this immunity.

As to the time when this Writage is due unto the King, the same is due as soon as the Ship comes on the Harrow Seas; here is the inception and progression of this duty, but the consummation of it, is when the bulk of the Ship is broken open; Wreck is due when this is cast and left on the Land by the Sea, and so seized; so Writage is due when laid on the ground.

In this Case no Writage was ever due, quia bona Civium: London is the Chamber of the King, to supply him with support, when he stands in need of it.

The Harrow Seas are parcel of the Allegiance of the King, he is to scourge them, and to defend his Merchants in them, for their safer conduct: It appears by 6 R. 3. Fitz. tit. Protection, placito 46. and by Britton, cap. 33. That the Harrow Seas are parcel of the Allegiance of the King, and parcel of the Crown of England; so that no Writage was due unto the King of the Goods of George Hanger, let him go whither he will.

6 R. 3. Fitz.  
tit. &c.

If any Writage be due to the King, it must then commence to be a duty, presently upon the loading, but not payable untill the unloading of the Ship: For after it comes into the Port here, no Writage is due by this coming of the Ship into the Port, for he may, if he will, go to another Port; as it hath been adjudged; but if he break the Bulk of the Ship here to unload, the Writage is due to be paid.

2 E. 3. f. 7.  
Coke 6 pars,  
f. 6. &c.

2 E. 3. fol. 7. Touching the Kings Charter, and what construction is to be made of the Kings Grants; and 6 pars, fol. 6. in Sir John Molins Case, the Kings Grants ought to have a very beneficial construction, and this for the Honor of the King, and for the relief of his Subjects, and not to have any strict or literal Construction made in subversion of his Grants; so here in this Case there ought to be as favorable and Honourable a Construction made of this grant as may be.

I agree the Case remembered of a Foreigner, that he shall not have the benefit of this discharge for his Goods.

If it be here demanded whose Goods these are, clearly they are the Goods of George Hanger, Nuper defuncti.

Obj. As to the Objection made of fraud, If this Ship comes in ten years after, no such matter appears to be in the Case, neither is it to be disputed, whether a Woman may be a Citizen: It appears by 46 E. 3. f. 13. that he is a Citizen who is Commercant, and an Inhabitant, and subject to pay scot and lot: If he dwelt in another place, he shall not be free; by 5 H. 7. f. 10. a Citizen and freeman of London, may by the Custom devise Land in Portmain; and with this agrees 28 & 29 H. 8. Dyer, f. 33. placito 12.

46 E. 3. f. 13.

5 H. 7. f. 10.

28 & 29 H. 8.  
&c.

Here are the Goods of George Hanger the Testator; for if an Action be brought against an Executor, and ruled against him, if he do not plead a false Plea, the Judgment shall be De bonis Testatoris, as appears by 33 H. 6. and 34 H. 6. f. 22, 23, and by many Books; so is the Common Law, and Common Reason makes the Law, which supplies all; by 10 E. 4. f. 1. If an Executor gives omnia bona & Cavilla sua, clearly by this grant, the Goods which he hath as Executor, shall not pass, neither shall such Goods be forfeited by his Will; and so is 33 H. 6. f. 31. 21 E. 4. f. 50. and 10 E. 4. f. 1.

33 H. 6.

34 H. 6. f. 22.

23.

10 E. 4. f. 1.

33 H. 6. fol.

31. &c.

10 H. 7.

16 H. 7.

If Executors have a surplusage of the Goods of the Dead, these ought to be employed in Pious Uses, and they of these to render an account to the Ordinary, as appears by 10 H. 7. and 16 H. 7. so that it is clear that the Law doth not account

of



of these goods in the hands of Executors, as of their own proper goods, but as the goods of the Testator; and as to the distribution in Pious Uses, and their rendering of an account, Doctor Bennet hath put this very lately in ure, and hath called some to render an account, by 21 E. 4. f. 50. If an Executor be <sup>21 E. 4. f. 50.</sup> Out-lawed, he shall not forfeit these goods which he hath as Executor, neither can he devise them by his Will, for his devise shall onely go to such goods which he hath in his own proper Right, and not unto such goods which he hath as Executor.

Here in this Case, these Wines are the goods of the Testator, and not of the Executor.

If a Forreigner brings a Ship laden with Wines into the Port of London, and then makes a Citizen his Executor, and dies, he shall not have the benefit of this Immunity from payment of Portage for these Wines, for that these are not bona civium.

Here the King hath freed George Hanger from the payment of Portage for his Wines; there is a great difference between the Case of one who ought to pay Portage, and of one who ought not to pay the same; where it is in the Case of one who ought not to pay Portage, and he dies, no Portage shall be paid for his Wines, which were discharged of Portage in his life time, as here in this Case the Wines of George Hanger were, and there is no president to be shewed to the contrary; here they are his goods in the Inchoation, progression, and perfection of this duty of Portage. For first, he loads them into the Ships. Secondly, he comes with them upon the Narrow Seas. And thirdly, they arrive here in the Port in his life if not, so that these are his goods, and his Executor for these goods of the Testator, ought to have the same benefit, as to this discharge of Portage, as the Testator himself might have had; for the Executor cannot forfeit these, neither for Wilful Treason, and so no Portage ought to be paid for these Wines, being the goods of George Hanger, who was discharged from payment of Portage, for his Wines brought in: And so in this Case Judgement ought to be given for the Defendant.

Yelver on Justice. In this Case Francis Hanger the Defendant, ought to be discharged from the payment of Portage for these Wines.

In this Case, the Grant of King E. 3. to a Citizen of London, is onely to be considered of.

The Wines here, are the proper goods of the Testator, he loads them as his goods, and then he was a Citizen and a Freeman of London, and a person well capable of this discharge; they are of necessity either the goods of George Hanger the Testator, or of the Executor; not of the Executor, ergo, of George Hanger; no third person can claim them as his goods, and so the Law accounts of them; they were once his goods, and none can deny this to be so: What reason is there therefore that they should not still be accounted to be his goods, he having made no disposition of them; and the Executor here, and so in all Cases, doth represent the person of his Testator, and this as well to all manner of charges, as discharges, and so is <sup>45 E. 3. fol. 17. placito 4. & 47 E. 3. fol. 23. & 10 E. 4. fol. 1.</sup> the Executor hath onely the possession, the property remains in the Testator, and so the Law accounts thereof.

<sup>45 E. 3. f. 17.  
placito 4. &c.</sup>

If the Debtor makes the Debtor his Executor, here the property of so much as the Debt amounts unto, is presently changed in Law, and a discharge for so much, which he may retain to pay himself; and so in Woodward and Darcies Case, Plowdens Commentaries, fol. 184, 185. and the reason of this is, for that it shall be more for the benefit and avail of the Debtor, that his Debts should be paid then otherwise; but otherwise it is where it shall be prejudicial unto him, there no such change or alteration shall be, as where a Woman Executrix takes a Husband, he shall not have these Goods, but his Wife who is Executrix shall have them, and

<sup>Plowdens  
Commenta-  
ries, &c.</sup>

33 H. 6. f. 31. and so is 33 H. 6. f. 31. and 21 H. 7. f. 29. which proves, that the Executor hath no property in the said goods, for if he had, then all should be given to the Husband, by his Inter-marriage with her.

If an Executor grants omnia bona sua, the goods which he hath as Executor do not pass, as before appeareth, and by 30 H. 6. fol. 3. the Lord may seize the goods of his Willain, but he cannot seize on such goods which he hath as Executor, and if he doth, an Action of Trespass lieth against him, by 18 H. 6. f. 4. and so it plainly appears, that no property in the goods, is in the Executor, but he hath them in the right of the Testator, and so is 20 H. 7. fol. 5. and Welkdens Case in the Commentaries, fol. 520.

Dame Hales  
Case, &c.

The first commencement of a thing, is many times in Law to be regarded, as appears by many Cases put to this purpose; in Dame Hales Case, in the Commentaries, fol. 260. so here in this Case, the first Act done by George Hanger, is to be regarded, (S.) the lading of the Wines by him in the Ships, he being then a Citizen and Freeman of London, and then they were his goods, and now the property in these goods is not altered by his death; but these shall be freed and discharged from the payment of Writage, in the hands of the Defendant, his Executor; and if he had not made an Executor, yet they should be discharged from Writage, in the hands of the Ordinary, he representing the person of the Executor, and so it should be in the Case of an Administrator; and so upon the whole matter, no Writage is to be paid to the King for these Wines, they being bona Civium; and so within the Charter of discharge of Writage, and therefore Judgement ought to be given for the Defendant.

Flemming chief Justice. In this Case the Defendant is not to be discharged, but ought to pay Writage for these Wines, the King having this Writage by his Prerogative.

The Question here is, Whether this discharge shall go onely to a Citizen, or shall be extended also to his Executor.

1. First, It is here to be considered the nature of Writage.

2. Secondly, To whom this is due to be paid.

3. Thirdly, By whom to be paid.

4. Fourthly, At what time to be paid.

5. In the next place, consideration is to be had of the Plea in Bar: and this doth consist of the Kings grant on immunity, (S.) Quod de vinis Civium, nulla prisā fiat, sed inde essent quieti.

6. In the next place it is to be considered, whether this here be a personal discharge, or common, or mixt, in the personalty and realty.

7. And lastly, the course of these Words of this Writage, is to be considered, together, with the extent of the words of discharge, and to what persons this shall extend.

It is to be observed for a Rule, Quod privilegium est beneficium personale, & extinguitur cum persona.

The Question then will be, Whether the Defendant here shall have any benefit of this personal Writage granted unto the Testator, or not.

1. This Writage is a Royal Prerogative, and due, time out of minde, unto the Crown as an incident, but yet not inseparable, and the same due for the Kings provision, (S.) to have of every Ship of twenty tuns of Wine, one tun before the Mast, and the other behind the Mast, and this to be delivered unto the Kings Officers and Ministers; and for this purpose he hath his Officer, Capitalis pincerna, his chief Butler, unto whom these Wines are to be delivered.

2. This Writage is onely due for Wines, and hath its denomination a Writage, of taking, because the same is to be taken by the Kings Officers.

3. Then of what persons this Writage is to be demanded: As to this, it is very clear, that this is a Prerogative duty, which the King is to have of all his Subjects, and

and of Strangers, who bring Ships laden with Wines into his Ports, and there unlade the same; and no person is exempted from this, the same being to be taken for the Kings provision, and to his use; and at the beginning, there was none free from this payment.

4. Then as to the time when this Portage first grows, and becomes to be a duty to the King: As to this, without all question, the King hath no right at all to have portage, when the Ship is beyond Sea, nor yet when the Ship is upon any part of the Seas, as if the same be upon the Parrow Seas, in coming for England; nor when the Ship cometh into the Port: But onely when the intention of the Owner of the Ship appears, that he will there unlade; and this is to appear by the breaking up of the Bulk of the Ship, or by his agreement for the Custom, and this entered in the Custom book, at this time onely, and not before is Portage due unto the King: And to say that this is not due before the Ship be unladed, this cannot be so, for then he cannot have as he ought to have, (S.) One tun before the Port, and another behind the Port; but when it is certainly known that he intends for to unlade there, then presently portage is due to be paid and taken, but not before, so that the time of this duty is very material.

Portus. A locus inclusus, and that for safety from Pyrates, and the King is at the charge of this, and Ports are as the gates of the Kingdom, and none is Owner of them but the King onely.

It hath been objected, that it is material to be considered, when Portage is due, and when not: But it is to be chiefly considered, when this is due as a thing in the Crown, and this is not so due, before the Ship comes into the Port; and this is then due from all, if they have not their immunity, for the King may discharge if he will, whole Cities and Corporations from the payment of this, but yet this ought to be by his Grant.

He which takes a Freedom, and so would be by this discharged from this payment, ought to bring himself within the compass of having benefit by this grant; so it is in case of a Prescription, and this is to be laid as a sure ground, for he ought to be such a person as may have benefit of this: And this is the very point here now in question, as touching the discharge of the payment of Portage, upon this Grant thus made unto the Mayor and Commonalty of London, and their Successors; this Body of the City is joyned to the Grant, and yet a Body Politick cannot have benefit of this, for this was not the intention of the Grant, but that this was to be to them in succession; and the persons which were to have benefit of this, are personal and singular, so that here is a mere personal Privilege granted.

The Case remembred of 21 E. 4. f. 7. A Grant made unto the Corporation of 21 E. 4. f. 7. Norwich, of an immunity that the Citizens should not serve of Juries, he ought to be singularis civis, and a Member of the City; there the Grant was made to the Corporation, but the persons singularly took benefit of this: And in such Cases, none but Citizens are to have any benefit of such an immunity.

The words of the Grant here, are, promelioratio civitatis, and for the advancement of the Honor and civil Offices of the City; this the ground of the Kings Grant.

The Case of Bristow, in 4 H. 6. remembred, where a Merchant Citizen removed his household to Bristow, but yet kept a Shop in London, but could not have the benefit of this discharge; and so the Case remembred in 43 Eliz. Sacheverils 43 Eliz. 2. Case, who was a Citizen within the City, and to bear Civilia & publica onera, yet he was not a party within the intention of the Grant, to have benefit of this discharge; he was incola; but this was but domicilium, he onely took Chambers, and removed, and so came and did Traffick; it was adjudged, that he was not within the intention of the Grant, to be discharged of Portage, yet he was a Citizen, a Freeman, and commorant there, but he ought to be inquilinus, and to have a House, not domicilium: And if such persons could not have the benefit of this



this Immunity, a fortiore, Executors shall not have the benefit of this discharge.

To prove this to be but a personal Privilege, and if so, then *extinguitur cum persona*.

They are not the goods, but the person onely, to whom this Immunity and grant hath respect, and the goods are discharged in regard of the person, and not otherwise: And as to this, if a Citizen do adventure for Wines, and his Ship is laden with Wines, and upon the Seas, to be transported for England, and before the arrival of the Ship he is disfranchised, he shall pay Writage for these Wines, because he was no Citizen at the time of the arrival of the Ship. Also, if one who is no Citizen, nor Freeman, do transport a Ship with Wines, and before their arrival he is made a Citizen, clearly such a one shall have the benefit of this Immunity, so that both are to be ruled according to the event, (S) If he be a Citizen at the time of the arrival and unlading; so if a Citizen do bring Wines to the Port, and before their arrival he sells these Wines to a Stranger, without all question he shall pay Writage, for now they are not *vina Civium*: Also if a Stranger brings a Ship laden with Wines into the Port, with an intention to unlade there, but before any Agreement by him entered into the Custom Book, or the bulk of the Ship broken, he sells these Wines unto a Citizen, he shall pay Writage for these Wines; for it was not the intent of the King, in this his Grant, to discharge them in such a manner, but this grant was made to them, to encourage them to adventure; and so in this manner to defraud the King, this is out of the intention of the grant, to discharge such from payment of Writage, who in this manner go about to forestall the King of his benefit and privilege of Writage; so that by this, it appears that the Citizens have this as a personal Immunity, and it is not sufficient for one that would have this benefit, to be locally within the City, unless he apparently also do bear the burthen of the City.

As to that which hath been said, that a Woman may be a Citizen: This she cannot be, to what end, she cannot bear *Civilia*, or public onera of the City, she cannot do any thing for the benefit of the City, she cannot perform Watch and Ward, she can bear no office in the City, neither can she be of any of the Companies; she cannot be an Attorney, she may be a free woman, but this is onely to have her will, (as many so have) but to no other purpose: But if she be to have any benefit of this Immunity, this is onely as Executrix of her Husband, and she hath onely relied upon this.

The main knot of this Case now is, Whether an Executor of a Citizen of London shall have the benefit of this discharge from payment of Writage for these Wines adventured for, and brought home by the Testator, who dyed before such time as the Writage became to be due, or not.

If the Law be clear in this, that this is a personal benefit, then the Law is as clear, that this *moritur cum persona*, and then the Executor cannot have the benefit of this discharge: This cannot be compared unto a better Case, then that which hath been put, where the King Grants to the Inhabitants or Citizens of such a place, free Carriage, without payment of Pontage, such an Inhabitant who hath this freedom, makes his Executor, and dies, his Executor shall not have this benefit, but shall pay Pontage for the Goods of his Testator; for this is not a duty, before the Goods come to pass over the Bridge, where payment ought to be, so the Law's in ancient times are free from payment of Toll, time out of memory; and he which will have this Privilege, ought to be such a Tenant, and if such a Tenant makes his Executor, and dies, his Executor shall not have the benefit of this discharge; for such a discharge, respects the person onely of him who is to have the benefit of it, and not his Goods.

If the King do discharge such a Ship of I.S. being at Sea, particularly naming the same from the payment of Writage, and he dies before the Ship arrives, his

his Executor here shall have benefit of this discharge, and these Wines shall be free from payment of Prilage, unto whose hands soever they shall come before their unlading.

And so the difference will be, where such a discharge is granted to any singular person for discharge of his Goods, and where the Goods are to be discharged are specially named.

Nota, The difference touching a discharge of Prilage.

As to the Wines here, which are not the Goods of the dead person, for he cannot have any Goods: The Executor, he hath the Goods of the Testator, for to employ them, and to make disposition and distribution of them, according to the Will of the Testator; and as to this purpose, he doth represent the person of his Testator: It hath been said, that the Ordinary may, and hath called in some to make their account, but as to this, the same is now but a new incroachment by him, and they do pretend for this, to have these Goods to dispose of them in pious Uses, but they will have and turn them in usus suos proprios, and this was never so known to be, before these later times; and this is not likely long so to continue.

As to this discharge here, the Law doth not respect the Goods, but the person:

It is to be agreed, that an Executor by his Will, shall not forfeit the Goods which he hath as Executor, neither shall they pass by his Grant, where he Grants omnia bona sua, these shall not pass, as before appears; but if he will specially give such a Horse, this shall pass, though he have the same as Executor; If an Executor brings an Action of Trespass for taking away of Goods, in vita testatoris, there he shall say, bona & catalla testatoris, but otherwise it is, where the Action is brought for taking of them out of his own possession, there he shall say, bona & catalla sua.

An Executor doth represent the person of the Testator, but yet not to all intents and purposes.

Obj. It hath been objected out of the words of the Grant, (S.) Quod de vinis Civium, nulla prisā fiat, and that therefore this discharge should go to the Goods.

Resp. This not to be so, but that this discharge goes to the person, being a Citizen, and not to his Executor, and so this here is casus omissus.

And as to the Ships here of the Testator, both of them came into the Port with an intention to unlade, and this was three days before his death; but the last came in the same day on which he died, and of the unlading of this, no intention at all appeared.

If this Grant here of discharge from payment of Prilage goeth to the Goods, then it must be agreed that these were vina Civium: But he ought to be a Citizen, who is to take benefit of this Immunity; and where the Commencement, Progression, and Consummation of a thing, of necessity is to go together, there all of them are to be respected; so it shall be in Cases of Relation, before remembred out of Dame Hales Case, in the Commentaries, but the same is not to be so here; in this Case of Prilage, no Relation being here to be in this Case, if the Defendant, the Executrix will have benefit of this Grant of discharge of Prilage, she must then bring her self within the compass of this Grant, which she hath not done, and so for this she is not to be discharged, but to be for this in misericordia, and so Judgement ought to be given for the King against the Defendant.

Williams Justice. Where the discharge is, as here it is, de bonis Civium, this shall extend and go to the Executor.

Flammie chief Justice. This discharge is not so, the same going onely to the person of a Citizen; but if the Ship had been discharged, there this should have gone to the Executor, and so is the difference.

Nota. That three of these Judges dying, and others succeeding of them, this Case was long argued again at the Bar; and afterwards, in this Term of Hillar. 12 Jac. good again;

12 Jac. the same was argued again by all the Judges, and in their Arguments they were again divided in opinion, (S.) two against two.

Haughton Justice. The Defendant here ought not to be discharged from payment of *Prizage*: In this Case these things are to be considered.

First, The duty of *Prizage*, quid est, what this is, and how this grows.

Secondly, Touching the validity of this Charter of discharge: And as to this:

1. This is an ancient duty in the Crown, and due unto the King and his Successors, as a *Prerogative*, and takes its denomination from *Prender*, 6 E. 3. f. 51. In a *Quo warranto* against the Arch-bishop of York, to shew for what cause he demanded to have *Prizage* for *Wines* brought into the Port of Hull, who claimed this by the Charter of 15 E. 2. which is a good Case to prove this to be a duty in the King, Trin. 12 Jac. B.R. between Kennicott and Bogen, such a Charter shewed for discharge of *Prizage*: So that all this proves clearly and fully, that this is an ancient duty in the King, and no doubt is to be made of this.

The great doubt here is, touching the time when this duty of *Prizage* grows to be due to the King.

This *Prizage* grows due, upon the unlading and breaking up of the Bulk of the Ship, and not before, which is proved by Kennicott and Bogens Case: It appears also by 6 E. 3. that the King did grant unto the Merchants, to be discharged from payment of *Prizage*, and for this Immunity, they did grant unto the King 2 s. in lieu of *Prizage*, for every Piece, and this to be paid, within forty days after the unlading, and this was so granted by them to the King, in recompence of *Prizage*; so that this duty of *Prizage* grows due to the King, upon the unlading of the Ship, and not before.

Obj. It hath been objected, that this grows due before the unlading, but the payment of this is not to be till the unlading.

Resp. As to this, the same is not to have any relation to the buying of the *Wines* in France, nor yet to any other time, for that this would make the same to be altogether uncertain.

As to this duty, the same shall onely relate to the time of the unlading, and not to the time of the arrival, for that no duty can be to the King, to have this by the arrival onely; but if it should relate to the time of the arrival, then it must relate to both the times; and if he be not a Citizen, and a person capable of this discharge, at both these times, he cannot have the benefit of it, by the words and meaning of the Grant: But here in this Case, the duty of *Prizage* is due unto the King onely by unlading, and not before.

In the next place: As touching the force and validity of this Charter of Discharge, the words of which being, *Rex dedit, voluit, & concessit Majori, & communitati civitatis London, quod de vinis Civium nulla prisca fiat, sed perpetuo inde essent quieti.*

First. This will be agreed by all, that none ought to have any benefit of this Charter of Immunity, but he ought to be a Citizen, in fact, and in every regard, like unto the Case in 12 Lib. Assisarum, placito 35. Brook tit. Grants, plac. 66. where a Charter of *Consuls* of *Pleas* was granted to the Dean and Chapter of *Deverwick*, that they should have *Consuls* of all *Pleas* which concerned the Dean and Chapter, and their men, in the one Bench or the other, excepting *Pleas* of the Crown for them, & hominibus: It is there questioned, who should be said to be *talīs homo*, whether their *Willeines*, or their *Domagers*, but by all agreed, that he must be *homo*: So here in this Case, he ought to be a Citizen, and a perfect Citizen to all intents, who is to take any benefit by this grant of Immunity; and as in the other Case, he ought of necessity to be *homo*, for that this, there was part of the substance of the Grant: so here, he that will be within the compass of this Charter of discharge from payment of *Prizage*, ought for to be *Civis*.

The

Charter of  
15 E. 2. &c.

12 Assisarum,  
placit. 35. &c.



The Charter here is, *vinis civium: De vinis civium, nulla prisla fiat*: In this Case: The time, quando, they ought to be the Wines of a Citizen, is to be considered, for this is here left not expressed, but uncertain, yet the matter of the Patent makes this certain enough, and a sufficient expression of this herein: And as to this, the matter of discharge ought to be applied unto the time of the discharge, and so by this construction, they ought to be *vinis Civium*, at the time of the unloading of the Ship.

28 H. 8. Dyer, f. 17. A good Case, as touching the exposition of time, where the condition of a Bond for the payment of Parriage-money, was in this manner, That if the Wife dyed before Michaelmas, without Issue of her body then living, that the Obligation should be void; she had Issue of her body, and dyed, and afterwards, before Michaelmas, the Issue dyed, there adjudged the Obligation to be void, for that these words (then living) shall relate *ad proximum antecedens*, (S.) Mich. and not unto the death; and it is there said, that in doubtful Words such Interpretation shall be made, as comes nearest to the intent, and there the time is much material.

Here in this case, though the time of this duty be not certainly set down, yet by the words of the Patent, sufficient certainty is expressed.

It is here to be considered, at what time this duty and charge riseth and groweth due; and then, that this Grant here extends unto the Goods of Citizens: And as touching this, the case falls into two Questions, (S.)

The first, Whether by the death of George Hanger, after the Ships laden with Wines, and before the unloading, these shall be now said to be in the Judgement of Law, *vinis Civium*, or not.

As to this, advantage had been taken, that these shall be said to be *bona testatoris*, and if so, that then there is a Citizen capable of this Immunity for these Wines, according to the Charter: But as to this, this shall not be so, though in common speech it is so; in 10 E. 4. fol. 1. by Littleton, there the property of Goods ought to be in some person, and this cannot be so in one who is dead; that this shall be so, appears by the usage, and of Judgements given against Executors, which is to be, *De bonis quæ fuerunt testatoris in manibus Executoris*, in manibus Executoris, and this is a good and sufficient proof, that they are not now in Judgement of Law, the Goods of the Testator: And if an Executor brings an Action for Goods, the same shall be, *De bonis quæ fuerunt testatoris tempore mortis*: And it is a very improper speech, to say that they are the Goods of the Testator of a dead man: In 24 E. 3. f. 35. the Writ was, *Recordare facias loquelam, quæ est in comitatu tuo inter R. executores testamenti A. and the Defendant, de quodam bove, ipsius R. capt.* It is there said by Skipwich, That by the same of Executor, the property of the beefe is supposed to be to the Testator; and afterwards by another Word, the Writ supposeth the property to be to R. and so a repugnancy in the Writ, yet the Writ is there awarded good; so that by this it appears, that these shall not now be said to be the Goods of George Hanger, who is dead: So that now here is a double Question.

First, Whether these Goods shall be privileged from payment of Parriage, in respect of the Woman, the Widow of George Hanger, for she hath here pleaded, that she is *libera famina*: As to this, for her quality, she cannot have the benefit of this Grant of discharge, for that she cannot be said to be a Citizen, 38 in the Book of Assises, and 45 E. 3. f. 26. being all one case in effect: It was found by Assise, by the Executors of London, That one Oates was seized of certain Tenements in the City of London, and had devised the same unto the Guardians of the House of St. Mary Overy, in Portmain, without the Kings License, which was returned into the Chancery; and upon this, a premonition facias, issued to the terre Tenants, to shew wherefore the Tenements should not be forfeited to the King, and there the Custom of the City was pleaded to devile in Portmain.

And

38 Lib. Assis.  
& 45 E. 3. f.  
26.

And there it is said by Finchden, that Citizens ought to have such Franchises, (S.) those to whom such Franchises did extend, (S.) to those which were born, and Inherits in the same City, by way of Heritage, or which are reciantes & taxables, to scot and lot; and that he which is not so, shall not be said to be a Citizen, if he be not commozant and resiant, subiects to scot, for payments, and lot, to supply the places and offices there eligible; and if he be not such a one, he shall not be said to be within the privilege of a Citizen.

This Woman here, the Defendant, notwithstanding by the Custom of the City, she hath some Privilege as to Merchandizer, during her Widow-hood, and so as to some purpose shall be said to be a Citizen; but this is onely quodammodo, but she is not subject to scot and lot, and therefore these Goods shall not have the privilege to be discharged of Writage, in respect of the Defendant being the Widow of George Hanger.

The second matter here considerable, is, Whether these Goods, being in the hands of the Defendant as Executrix, and so quodammodo the Goods of the Testator, whether these Goods in regard of the Kings Patent: De vinis Civium nulla prius, shall be capable of this discharge of Writage, that they shall not be discharged: And in this, as to the Goods in the hands of the Executor, they are bona sua, to have an Action, and not of others: The Kings Grants ought to be construed according to his meaning, and this more especially, in such general grants as the latter is here in this Case.

Here these are bona of Frances Hanger, in possession, but not in right.

15 Eliz. in  
the Exche-  
quer, &c.

This Case was adjudged in 15 Eliz. in the Exchequer, and remembred Coke 1 pars. fol. 46. in Alton Woods Case: King E. 6. by his Letters Patents, ex certa scientia, & mero motu, did Grant unto Crowch, omnes terras dominicales Manerii de Wellow; It was adjudged, that the customary Lands held by Cope, parcel of the same Manor, did not pass, and yet they are also in Law, parcel of the Demesne of the Manor, for that the Grant of the King, notwithstanding the words being, ex certa scientia, & mero motu, shall not be construed to pass any other thing against the intent and purpose of the King; expressed in his Grant; and yet without all question, in case of a common person, these should well pass, but not in the Kings Case.

Kellaway,  
f. 148. &c.

Kellaway, fol. 148. b. placito 29. In a Quo Warranto, the Kings Charter was shewed, by which was Granted unto him, that he, and all his Tenants of his Honor of L. shall be quit of Toll through the whole Realm, the which Charter was Inrolled, and he shewed that he was a Tenant of the same Honor: It was demanded of him by the Justices, Whether he was a Tenant mediate or immediate, and he said, per meine, and therefore it was awarded, that his Franchises, as to this point, should be seized into the Kings hands, because he was not a Tenant according to the common Usage; 1 H. 7. f. 13. this Case put by Bryn, and not denied: If A. B. Sheriff, or other Officer, be in the Kings debt by reason of his Office, makes his Executors, and dies, the King pardons the Executors by their proper names, omnimoda debita sua, these Executors shall never take any advantage by this pardon, because in effect, they are the Debts of two several persons: It is there said, Quod qualibet pardonatio debet capi secundum intentionem regis, & non ad deceptionem regis, and to this purpose is 2 R. 3. fol. 7.

1 H. 7. f. 13.

2 R. 3. f. 7.

If a tenant in ancient demesne hath a Privilege Granted to him, to be discharged from payment of Toll, if he make his Executors, and dies, his Executors shall not have this Privilege.

So here in this Case, inasmuch as these Wines were not absolutely bona of Frances Hanger, though she may have an Action for them, yet quodammodo they are here; these Wines were unladen after the death of George Hanger, and therefore, neither in respect of him who is dead, nor yet in respect of the Defen-  
dant

dant, his Widow, being his Executrix, are these Wines by this Charter to be discharged from payment of Writage; but the same ought to be paid, and so Judgment ought to be given for the King.

Dodderidge: Justice. That Judgment ought to be given against the King, for discharge of Writage for these Wines, no Writage being here due, the Defendant being to have the benefit of this Immunity Granted by Charter.

As touching Writage it self: This is a right settled in the Crown of England, as a prerogative, and this hath been so time out of minde.

3 E. 3. Customa magna, which was the Merchants, by Charter granted unto the King: Custom for the Wares brought in, and for this, the King Granted unto them divers Immunities: The one was, to be discharged of Writage: And for this, they did grant unto him for every Tun 2 s. and this to be paid within forty days after the unlading of the Ship, and this was so done by the Merchants Strangers: the original of this is in the Tower, 31 E. 1. and a Transcript of this is in the Exchequer, and Commissions have been upon this.

6 E. 3. f. 3. Case 15. mentions this to be a right in the Crown, but yet granted to be over by him.

30 H. 8. Dyer, f. 42. 1 Maria, Dyer, f. 92. 1 Eliz. Dyer 165. as touching things Grantable over by the King.

This Writage is an Inheritance incident to the Crown, and yet such as the King may grant away, and from the payment of this, he may discharge any particular person.

6 E. 3. f. 5. Case 15. and f. 10. Case 28. and f. 51. Case 50. being all one and the same Case: the which was this, John Archbishop of York, did challenge Writage of Wines in the Port of Hull, (S.) to have two Tuns of twenty: A Quo warranto for this was brought against him, and upon this he claimed to have the first taste of the Wines, and the buying of them, after Writage discharged, and so there was a Re-pleader: Afterwards another Successor of his took Writage, and in a Quo warranto brought against him, he disclaimed in this, and did also claim to have onely the first taste of the Wines, and presumption, after the King had his Writage: Afterwards, William Arch-Bishop of York, did present a petition to the King, to be restored unto the said Privilege, for to have the Writage: Mich 5 E. 3. This Case did begin, and 6 E. 3. he began to plead: Exceptions taken to the pleading of the Restitution of his franchises, he was put to answer, and said, that he had no full Restitution, and that before he had this, he ought not to answer: this is mention made of the 2 s. and there it is said, that he ought not to have this of Merchants Strangers, but to take it in kinde: Then he pleaded a Charter, by which he granted omnes prisas suas unto him; against this the several disclaimers were pleaded.

In this Case two Points were moved: First, Whether the Charter it self did carry this, or not, and fol. 51. adjudged, that the Charter did not carry it.

Secondly, As touching the Disclaimer; and to this it was adjudged also, that this Disclaimer by the Predecessor, should bind the Successor, 6 E. 3. f. 5. 10. and 51. and there in the end it is so adjudged.

As touching the Writage in the Exchequer, 22 H. 6. fol. 10. in the Case of Woolles, both touch this Case of 6 E. 3. but there was no doubt made of the right of Writage.

The main point here in this Case, rests in this, (S.) Whether this Immunity, to be discharged of Writage, shall extend to these goods in the hands of an Executor, the benefit of which, being to turn to a dead man, who is not in rerum natura: There is no doubt to be made of this; but that this grant being thus made unto a Politick Body, shall extend to every particular Member of the same, in his natural

31 E. 3. Customa magna.

31 E. 3. in the Tower.

6 E. 3. fol. 3. &c.

6 E. 3. f. 5. &c.

22 H. 6. fol. 10.



20 E. 3. &c. ral capacity, 20 E. 3. Fitz. tit. Corone, placito 125. A Citizen of London sued an appeal of Robbery; the Defendant gaged Battle, the Plaintiff said, that he was a Citizen of London, and that they have there such a franchises, that no battle shall be gaged against any of them; this extends to every particular Citizen, 21 E. 4. f. 12. & 27. the Case of Norwich to this purpose, & 8 R. 2. Fitz. tit. Grants, placito 105. King John by his Charter, did Grant unto the Town of Lyn, that they should be a Borough, and that they should have a Provost in the same Ville, and that they shall be quitred of Toll, per tout le Realm; and did also Grant unto them by the same Charter, that if any one did take Toll of them, contrary to the Charter, that they might take again of them in Withernam, within the Jurisdiction: Afterwards King Henry the third, rehearsing the Charter of King John his Father, did Grant unto them, that they should have a Mayor and two Bailiffs, and that they should be quit of Toll, per tout le Realm: This Grant was made unto the Politick Body, but the Natural Body to take benefit of this; so here in this Case, the Grant was made to the Politick body, but the Natural body to take benefit of this; but here they shall not have benefit of this Charter, for those Goods which they have in their Politick, but for those which they have in their Natural Capacity: He who is to take benefit here of this Charter of Discharge from payment of Prillage.

First, He ought to be a Citizen of London, and this hath divers significations, some are there Inhabiting, and so in this regard they are called Citizens: But if he hath not jus societatis, this Charter of Discharge of Prillage shall not extend unto him.

5 H. 7. f. 10. &c. Also every one which hath Land in London, by Custom there he may devise this in Mortmain, and yet notwithstanding he is no Citizen, 5 H. 7. f. 10. & 19. 45 F. 3. f. 26. A Citizen is such a one, as ought to be subject to scot and lot, and he ought to be liber homo; scot and lot are particular payments imposed upon every one, but extends not to one who is commorant in another place.

He ought to be a Citizen and a Free-man, and also commorant there who is to have benefit of this Charter of Amuninty.

4 H. 6. Rot. 14. &c. And therefore as to this purpose, there was a good Case in the Exchequer, 4 H. 6. Rot. 14. or 18 Knowls Case, there he was a Citizen and a Free-man of London; but he left his commorancy, and dwelt at Bristow, and yet remained a Citizen and a Free-man; and was eligible to be called unto any Office; there it was yet adjudged, that he should not have the benefit of this Charter, to be discharged from the payment of Prillage; but he ought to be also a House-keeper in London: But if he be a Citizen and a Free-man of London, and do dwell there; as if he keeps no House, but takes a Chamber there, and so is an Innmate, this Charter of discharge shall not extend unto him: And this was also so adjudged in the Exchequer, Termin. Hillar. 43 Eliz. Rot. 22. in the Case of Sacheverill, and Thom. Snede: An Information was brought against them by Coke, then Attorney-General, for taking of these Wines without payment of Prillage, and adjudged there against them, because they were but inquilini.

By this Charter here of discharge of Prillage, the words are these, (S.) De vinis Civium, nulla prislatio.

As to this, it is to be considered, what manner of Citizens these ought to be, (S.) Citizens, Free-men, & Commorant, not in a Chamber, but to keep a fixed House there; and this is sufficient, as touching the persons who are capable to have the benefit of this Charter of discharge of Prillage.

In the next place, as to the Goods, what Goods are to be freed from payment of Prillage.

1. First, The person to be discharged, ought to be the sole Owner of these Goods.

2. Secondly, He ought to be the sole Proprietor of these Goods.

3. Thirdly, He ought to be the true Proprietor of these Goods.

4. Fourthly,

4. Fourthly, This property ought to continue so in him, without any alteration.

1. As touching the first, That he ought to be the sole Owner, and therefore if he have them jointly with another, Passage shall be paid for these Goods; as if a Citizen and a Stranger be jointly possessed of Wines, they shall pay Passage for these, otherwise this Charter of discharge should be extended to a Stranger, the which shall not be.

2. Secondly, He ought to be the whole Proprietor, for if he have the general, and another the special Property; or if he have the special, and another the general Property, they shall pay Passage; As if a Citizen do pledge Wines, he now hath in them the general Property, and the other the special Property: And if a Stranger do pledge Wines to a Citizen, he hath the special Property, and the other the general; if these Wines be unladen, Passage shall be paid for them. The reason of this is grounded upon 34 H. 8. Brook tit. Pledges, placito 28. 13 R. 2. Brook tit. Pledges, placito 31. 22 E. 4. Fitz. tit. Bar. placito 121. & Plowdens Commentarij, tit. Sec. in Nichols Case, t. 487. 34 H. 8. A man doth Gage Goods in pledge for 40 l. borrowed upon them, afterwards the Debtor is condemned in 100 l. Debt to another, these Goods shall not be taken in Execution, until the 40 l. be paid, for the Creditor hath an Interest in them, as in 22 E. 4. f. 10. A Lease made of Land, and a Flock of Sheep for years, they shall not be taken in Execution during the Lease; also Goods taken for a Distress, shall not be put in Execution, 35 H. 6. fol. 29. Symon Eyre found Goods of another, and bailed them over for money, there the Owner may take them again, 22 E. 4. per curiam.

3. If a man sells Goods unto one in pledge, and afterwards he is outlawed, the King shall not have these Goods before the party be satisfied: If a Lease be made to one for years, of Goods, and he is after outlawed, a Scire facias issues out for the King, he shall not have the Goods till the Lease be ended, 13 R. 2. A Termor is distrained for Rent behind, afterwards he is attainted for Felony, done before the Distress taken, per Curiam, the King shall not have this Distress as a forfeiture, unless he do satisfy the party who distrained, for this was lawfully taken, tempore captionis. And if one do Gage Goods to another, and afterwards is attainted of Felony, yet the King shall not have these Goods thus Gaged, without payment of the sum for which they were Gaged; the reason of this is, because that neither of them hath the absolute Property in the Goods so Gaged.

3. Thirdly, He ought to be the true Proprietor; As if a Stranger do buy other Wines, and afterwards fraudulently, and of set purpose to defraud the King of his Passage, sells these Wines unto a Citizen, to be sold unto him again after the unloading, yet for these Wines he shall pay Passage, because he was not the true Owner of them.

4. Fourthly, This property ought always to continue in him, without any alteration and disability of the person; As if a Citizen be disfranchised before the unloading of the Wines, then he shall pay Passage for these Wines. And this fourth matter brings now this main point in question.

Obj. And as to this, The question ariseth by way of an Objection, Will you extend this Charter here of discharge of Passage unto the Goods of an Executor? (this cannot be.)

Resp. As to this, for some Goods an Executor shall have the privilege to be discharged of Passage, and for some Goods not so.

For such Goods of which the Testator was never actually possessed in his life time, nor yet at the time of his death, for these the Executor shall pay Passage; But otherwise it shall be for those Goods of which the Testator was actually possessed in his life time, and at the time of his death, there for these Goods the Executor is not to pay Passage, as here in this Case now in question.

If a Citizen hath a Factor who sells Goods and buys Wines, and brings them hither after the death of the Testator, the Executor here shall pay Writage for these Wines; and that because his Testator was never in his life time actually possessed of these Wines: But he shall have the benefit of this discharge, onely for such Wines, in which the property was in the Testator in his life time, and so continued also at the time of his death: But an Executor shall not have this benefit of discharge of Writage, for all such Goods as he hath as Executor, and which shall be assess in his Hands, but onely with the restraint as before: Here in this Case, the Testator dyed before the Wines arrived in the port; whether for these Wines the Executor shall pay Writage, or not.

As touching the Cases and Reasons why in this Case here the Defendant Executor ought to be discharged from payment of Writage for these Wines.

Obj. First, the nature of these goods is to be considered; here the Objection hath been made that a dead man can have no property in goods, as the Verse is:

*Da idag, dant tua sunt, post mortem tunc tua non sunt.*

Greysbrook  
and Fox  
Case, &c.

Resp. In answer to this, That notwithstanding in verity and truth, a dead man can have no property, yet in the Judgement of Law, the property remains in him; and Fox and Greysbrooks Case, in Plowdens Commentaries, fol. 279. is good Law.

Obj. Also an Objection hath been made out of the Judgement given, (S.) que fuerunt: As in an Action brought against Executors, who plead fully administered, and found against them, they shall answer; De bonis que fuerunt testatoris, if they have any; and for Costs, de bonis propriis.

Resp. But here a distinction is to be made, between the Goods which he hath as Executor, and which he hath in his own right: Those which he hath as Executor, he is not to forfeit them, by Writage or Attaint, and this proves that they are not his goods; for that all his shall be forfeited: So that he veritate, he is dead, but per in Judgement of Law, he is living in representation, for that Executors do represent the person of the Testator.

But yet to come nearer, whose Goods are these, the property cannot be in such persons, but the same must be in some body: A moyn may be an Executor, and yet he cannot have any Goods, and therefore the property in them, in Judgement of Law, remains in the Testator.

10 E. 4. f. 1.

10 E. 4. f. 1. An Executor grants omnia bona sua, those which he hath as Executor, do not pass by this Grant.

Again, an Executor hath not in him an absolute power to dispose of these Goods which he hath as Executor; he cannot devise them: By act in his life time, he may give them away, but this shall be a Devastavit in him, but of his own Goods, he may make any disposition as he pleases.

Again, it is to be considered, for whose benefit this not paying of Writage here shall be, this shall not redound to the benefit of the Executor, but the same shall be for the benefit and advantage of the estate of the person who is dead. And though his person be taken away out of the world, yet he hath left his Estate here behind him, to be disposed of for payment of his Debts.

Again, for whose reason will you now take away from him this Privilege of discharge from payment of Writage, given unto him by this Charter, because he dyed between the coming in, and unlading of the Ship; if he had lived, he should then have the benefit of this Charter of discharge of payment of Writage, and shall this act of God now take this away from him; it shall not do so; for that the act of God shall not turn any man to a prejudice: And here is no act at all done by him, which may ways to disable him from having the benefit of this Charter, and therefore the act of God, by death, shall not take this away from him.

And this Charter was Granted for the increasing of Trade, and therefore it shall be Construed largely, and as beneficially to the Subject as may



may be, and he hath here left an Estate behind him, though his person be gone.

Obj. It hath been again further Objected, that true it is, that these Wines here are in Judgement of Law, the Goods of George Hanger; but he which is to have this Privilege, to be freed from payment of Wharfe, ought for to be a Citizen, and that now George Hanger, non est Civis de civitate London, but he is Civis de civitate Dei, and therefore this benefit of discharge shall not extend to him, nor to these his Goods.

Resp. As to this, it is properly to be considered, when this privilege shall be to the Subject. As to this, the duty of Wharfe beginneth at one time, but the same is payable at another time. (S.) When the Ship comes into the unloading Port, then this privilege of having Wharfe is due to be paid to the King.

Obj. But then it hath been again thus Objected, that this is altogether uncertain, whether he will unlade there or not, for that he may unlade his Ship in any Port where he pleaseth.

Resp. As to this, the same is not so, but here is sufficient certainty of his purpose to unlade, for it appeareth by his Cocket where he will unlade, and then the Kings Officer may presently take his Wharfe for the King, and is not to tarry his leisure; nor yet to attend him at every Port; if there be twenty tun and more in the Ship, the King is to have his Wharfe, and to elect one tun before the Spain Mast, and another behind it; and if he should tarry for the unloading of the Ship, he cannot then have this in this manner, as it ought to be taken, and the other ought not to break the Bulk until the Kings Officer comes for to make his choice, so that the Wharfe is due unto the King, when he comes with the Ship to the Port to unlade; and if the Kings Officer comes and demands his Wharfe, and the other will answer him, that he will not unlade here, but at Hampton, yet this shall not hinder him from taking of his Wharfe here, and he shall not dribe him to every Port for to demand this, at his pleasure: And if he once begins for to unlade, he ought there of necessity to unlade all, otherwise he may defeat the King of his Election: which ought not to be: But the Kings Officer, he which is capitalis pincerna, may take the Wharfe for the King when he will, the Ship being in the unloading Port, whether he will unlade there or not; otherwise, it may be in his power to make the Kings Officer to give attendance on him in every Port, when, and in what place he will, at his pleasure, to expect his unloading, and then to demand his Wharfe, if not due before; but this he shall not be enforced to do, for that Wharfe becomes due unto the King before the unloading.

Obj. It hath been further Objected, That every real Privilege ought to have a real man, to take benefit of this, and that here the Executor is but onely a person representative.

Resp. In answer to this, notwithstanding this be so, yet the Executor here shall have this privilege, for the Goods of the Testator.

If a man makes the Willeine of I. S. his Executor, and dies, the Lord doth seize, by 34 E. 3. he shall not have this as a perquisite, for these are not bona sua: But these Goods fuerunt, and yet are the Goods of a freeman, and now in the disposition onely of the Willeine as his Executor.

By this Charter here, the King Grants unto Merchants Aliens, divers Privileges: As if their Goods be stolen, and the Felon doth waive them, that these shall not be said to be Waifs, by 13 E. 4. A Lord who hath bona wariata, shall not have these goods of Aliens so stole and waived by Felons. If an Alien hath Goods which are stolen away, he makes his Executor, and dies; afterwards, the Felon brings these Goods into a Franchise, and there he waives them; the Lord of the Franchise, who hath bona wariata shall not have them, for his Executor shall have this Privilege: Here the privilege is annexed unto the property which he had in his life time, and therefore after his death his Executor shall have the benefit of this.

Obj. Another Objection hath been made, that the Kings Grant shall be taken and construed most beneficially for the King, and shall not be extended unto a special Case.

Resp. In answer to this, the same is to be agreed, but when this special Case is within the compass of the General Grant, then otherwise it shall be: As if the King Grants to one, all his Tenements and Hereditaments in Dale; and he hath an Ad-vowson there, by 16 Eliz. Dyer, this shall carry the Ad-vowson, for it is an Hereditament.

Here in this Case the Grant is, Quid de vinis Civium, nulla prisā fiat, notwithstanding his person be dead and gone, yet these his Goods do remain, and this benefit of discharge of Writage, shall rebound unto his Estate, which doth still remain: And so upon the whole matter, Judgement ought here to be given against the King, and for Frances Hanger the Defendant; that for these Wines, he ought to be discharged from payment of Writage.

Croke Justice. Maintained his former Opinion, and the same grounded upon his former reasons, That Judgement ought to be given for the King, and against the Defendant; that for these Wines he should pay Writage, and not to be discharged of the same, by the Charter of Grant and Immunity.

Coke chief Justice. This is a great Case, the which was first in the Court of Exchequer, and there to be argued by the Barons, and three of them were of Opinion against Sir Thomas Waller; but this would not satisfy him, and therefore he brought this matter again to be questioned, and determined here in this Court; and this Case Trin. 10 Jac. hath been argued here before by the Judges; Tetmum. Trin. 10 Jac. wherein they were divided, (S.) Two against two: And now the same Case argued here by us again.

Qui incipit sine ordine, Ne tollit end in Confusion.

I shall therefore divide this Case into parts: As,

1. First, To examine the true causes of the Granting of this Charter of discharge of Writage by the King.

2. Secondly, or in the second part, in the bye, to see the success of this Charter by Parliaments, and by Records for the same, this being onely in the bye, but yet very worthy of observation.

3. Thirdly, Touching the Grant it self, in which these five things are necessarily to be observed: As,

1. First, To whom this Grant is thus made.

2. Secondly, To what thing this Grant is to be extended.

3. Thirdly, De quibus rebus, of what things this Grant is.

4. Fourthly, What person shall have the benefit of this Grant (the same being Granted to a Body) and another takes benefit by it.

5. Fifthly, What kind of Writage this is, (S.) One tun to be taken, ante, before the Pass, and the other, a retro, behind the Pass: And in this it is to be considered.

1. First, Quid nomine, what thing this is.

2. Secondly, Quale, what Inheritance this is.

3. Thirdly, Quo jure, this is due.

4. Fourthly, De quibus personis, this is due.

5. Fifthly, Quando & quomodo, when, and how this is due, and this is the very life of the Case: And then

6. Sixthly and lastly, If all these should be against me, that he is not here Civis, neither these Wines vina civium, yet it is a clear Case, that no Judgement here can be given for the King.

In the Argument of this Case, I shall answer the Exceptions and Objections as they arise; and I shall make good my opinion in this Case,

1. First,

1. First, By Records, being venustatis & veritatis monumenta.

2. Secondly, By Book Cases.

3. Thirdly, By Judgements in the Point.

As to the Charter, the words of the same being, quod de vinis Civium, nulla prisā fiat: The causes of this Grant are very evident to be collected out of the Records, they being,

1. First, For the advancement of Trades and Traffick, inward and outward: As the carrying forth of Native Commodities, and the bringing in of Foreign, and this is the life and the soul of this Island, which cannot stand and subsist without it.

2. Secondly, For the maintenance of the Navy, being lignei mures, for the Ports are the Walls and the Gates of the Realm: And 26 Eliz. the Queen did Grant unto a Bishop, a Port, and this was adjudged to be a void Grant, and that for this reason, because they are the Gates of the Land.

And as for London, this is Cor regni; and this Charter here was Granted to them, pro melioratione Civitatis: Also the Lord Mayor of London is chief Butler to the King, at his Coronation: And in 1 H. 4. this was so allowed unto him, when Fitz. Allen was Lord Steward, who then allowed this unto him. The Lord Major of London, chief Butler, &c.

This Charter here is, in meliorationem Civitatis, for the maintenance of Trade, Traffick, and Habitation, and the same to be brought to London for the avoiding of drunkenness, for that all the Realm besides cannot avoid the superfluity of Wines: In the City of London, they are as under Law, there being a Writ for to restrain Drunkenness, and therefore to be brought in thither.

In the next place, As to the Success of this Grant, Una lex alienigenis & indigenis, but indigena, are to be preferred before alienigena; this doth much enrich the City, when private gain is mixed with the publick: But then the Gascoyns, Almagines, and Spain, did complain, that London had taken away from them all their Trade of Wines; upon this, for these Statutes of 27 E. 3. cap. 7. against Licenses for passage of Wools, Leather, Woolfels, or Lead, out of the Realm, and 42 E. 3. cap. 8. That no English Merchant shall go into Gascoyn for Wines; so that by this, precedence was given to the Gascoyns, they onely to bring Wines in thither, and in this Strangers were preferred: But this Act was but for one year, for in 43 E. 3. cap. 2. this Act was repealed. Statutes of 27 E. 3. &c.

Clothing, and this Immunity from payment of Writage, hath very much enriched the City of London: By this, Habitation hath been increased, and Strangers shouldered out: For it was against all reason and policy, to prefer Strangers, before homeborn Citizens and Subjects.

3. As to the next and third point, being touching the Grant it self, of this discharge of Writage; And in this,

1. First, What Writage is. Prisa est vox artis, and derived a prender; It is but a taking; and this which is so taken, est prisā, Nulla prisā, &c. videlicet both explain this, being nomen equivocum.

2. Secondly, Quid est re, genus, the kinde of this being described; the same being a certain duty, due unto the King by Custom, and the same a Privilege in him as King, he having by this a good Title, to have and take of all English Merchants onely, so much, bringing in Wines from the Ports beyond Sea; for if he bring Wines from one Port to another, to have Writage here, in such a Case there is no colour for it, but the same Wines ought to be brought from beyond Sea; And this is terminus a quo, and so to be brought unto the Ports here, being terminus ad quem.

If there be in the Ship twenty tun, and above, then the King to have two tun for his Writage; But if under twenty tun, then he is to have but one tun.

And this is due to the King by Custom, if brought into any Port of England, paying for Portage 20 s. for every tun. And this description of Writage, is proved



bed by a Record: Then quid est nomine & re, with the manner of the taking of it, (S.) One tun, ante dolium, and the other deorsum.

This Portage is called in an old Record, Regia prisā, recta & cerra prisā, and for Portage, every Merchant is to pay 20 s. all which is proved by Record, (S.) In Rot. patentium, 40 H. 3. De prisīs regis, videlicet, de certis prisīs, (quia certus numero) if ten tun, then to have one tun; if twenty, then two tun; prisā regia, so called, because the same is an ancient Custom, and a Flower of the Crown.

Also in Rot. patentium, 28 E. 1. rectis & certis prisīs, so called; this is there said, to be an ancient duty, due unto the King of Common Right.

Also in Rot. patentium, 20 R. 2. a good president, memorandum est, quod rex habet, a property, ex antiqua consuetudine, his Title to have de quadam nave mercatoris, if buy, and bring hither to sell, Portage if he comes infra aliquem portum Angliæ: De viginti dolis, to have, duo dolia, (S.) One before, the other behind the Mast; and as soon as he arrives, Portage is due, & pro quodam certo pretio prisā viginti solidos, 6 E. 3. f. 9. by Parning, mention is there made of the 20 s. to be paid for Portage.

In libro rubro in Scaccario, fol. 265. In libro rubro in Scaccario, f. 265. mention is there made of King John's Grant unto Merchants.

At the Common Law, they were not to be acquitted, but to pay pro quolibet dolio vini, duct. per Mercatores, infra regnum Angliæ & potestatem regis, and so it was used in the time of King John, to be paid by all Merchants Strangers also.

Fleta, lib. 2. cap. 22. Et. And so is Fleta, lib. 2. cap. 22. De officio Pincernæ, Officium Pincernæ est, de quolibet Navi, vinis venalibus carcata, unum dolium vini eligere in prora Navis, ad opus Regis & aliud in puppi, & pro quolibet pecia, pro portagio 20 s.

As to the Charter of the King made unto Merchant Strangers: In Rot. patentium, 31 E. 1. the Kings great Charter: As touching Butlerage, what this is, and how this began, 31 E. 1. The King did grant mercatoribus, Almonia, Francia, Hispan. & omnium aliorum regnorum, to be free from Purage, Pontage, and to have legem mercatorum, of full and speedy Justice, secundum legem mercatorum. And this is the Fountain of Pontage and Portage, to have one tun before, and another behind the Mast; divers other Privileges were then granted unto the Merchants, and the Merchants, propter has libertates, did grant unto the King duos solidos, to be paid infra quadraginta dies, and so from hence it may be collected, that Portage ought to be paid within forty days: And this the King had from Merchants Strangers onely, by their own Grant, for the Immunity Granted to them: And this is called Butlerage, so that the King hath this Butlerage of Merchants Strangers: And Portage of Merchants Anglois, not of Strangers, but of London Merchants, he is to have none of them.

4. In the next place it is to be considered, Qualis est prisā; This is not purbage, which the King cannot Grant over, being inseparable from his person. This is separable, and inseparable, inseparable by way of Grant, but well separable; by way of discharge.

In Rot. patentium, 26 Aprilis, 15 E. 2. The King did Grant unto one Fitzherbert, so many Tuns of his Portage; And this agrees with Fleta, before remembered.

Statute of 1 H. 8. c. 5. By the Statute of 1 H. 8. cap. 5. No Citizen of London, &c. being free of Portage or Butlerage of Wines, by Grant, Custom, or otherwise, Custom no Wines of any person, &c. so that a man may prescribe in not paying of Portage, so that this hath its commencement by Custom.

5. In the next place, when this Portage is due to be paid.

As to this, when the Wines were bought in France, no Portage was then due to be paid for them, neither was any Portage due, the Wines being upon the Sea,

not yet upon the arrival of the *Wines*: But all these together makes the *Prisage* due.

This Case here in question, as to the duty of *Prisage*, may be fitly exampled unto *Dame Hales Case*, in the Commentaries, where he and his Wife were possessed of a *Heale* for years: Justice Hales changed his Religion, but *vindicta & ira dei* followed this, he was never his own man afterwards, but distracted. First, He put himself into the Water, and he afterwards dyed; his putting of himself there first into the Water, was to be respected; so here in this Case, George Hingers putting the *Wines* first into the Ship.

Obj. As to the Objection made, that here was not *Civis*.

Resp. As to this, here is *Civis & vna Civium*; *Civis est masculus, & Famella*, this Charter of Discharge of *Prisage* goeth to both Sexes: This word *Civis* is taken five manner of ways in our books.

First, *Civis rei, & non Residentia*, and such a one is not in Judgement of Law a Citizen, and this appears to be so by 35 H. 6. f. 12. *precipe J. B. in Debt*; *Civis Eborac.* Non residentia, 36 H. 6. f. 28. *Cive & pannario London*, and he did not dwell there; this not good, for he may be *pannarius de London*, and yet dwell at York, 4 E. 4. f. 10. where one is *Civis de London*, and dwelt in another place: And if this sufficeth not, in legis affirmatione, non sufficit, in legis concessione: If he be a Resident onely in name, this is not good, by 24 E. 3. f. 7. 5 H. 7. f. 10. & 24 E. 3. f. 7. 19. if he be not a Citizen, and a free-man, he cannot by the Custom devise his Lands in *Wormain*: Also if he be but *Inquilinus*, this will not serve his turn; but he ought to be a continuing Citizen, and resident: He ought to have *ius habitationis, & ius societatis*: If in the Interim he happens to be dis-franchised, he shall not then have the benefit of this discharge of *Prisage*, but he ought to be a continual Citizen: And if all these do concur in him, and he continues to be *Civis*, then he is every ways compleat, and enabled to have and enjoy the benefit of this Grant of Discharge, *Bracton*, f. 411. comprehends all these in one Word, (*S.*) *Barones London*.

6. As to the next matter in this Charter of Discharge, (*S.*) *De vinis Civium, nulla pris fiat*: As to this, this Privilege is not so much tyed unto the person, but also to the *Wines* of Citizens: And the Charter it self here goeth unto *Wines*, (*S.*) *De vinis*, &c.

It cannot be denyed, but that *Proprietas* is divers ways to be taken: And as to this:

There is *ius proprietatis tantum*: And  
There is *ius possessionis tantum*: And  
There is also *ius proprietatis, & possessionis*.

There ought to be *ius proprietatis*, this ought to be *proprium quarto modo*. For so, if he pledge these *Wines*, or if he have them as a pledge; but this ought to be *proprietas sola, & absoluta*; For if two, or twenty Citizens jointly have *Wines*, they all shall have this benefit of Immunity: *sola*, that is, *soli Cives*, but not so, if they have their Interest in the *Wines* with a Stranger: Then for these *Wines*, they shall not be discharged of *Prisage*.

Also this property ought to be *proprietas vera*. For if a Foreigner do fraudulently make a Citizen his Heir, by a fraudulent conveyance to him made, and this done by him onely to defraud the King of his *Prisage*:

In such a Case, the King shall have *Prisage* of these *Wines*, for he ought to be *verus proprietarius*.

Reasons to prove that these *Wines* here in this Case, ought by the Charter of Discharge, to be freed from the payment of *Prisage*.

1. First, The discharge is of *Wines* of a Chattel: And then a representative, or a representative Chattel, shall be within the compass of this Grant.

2. If the King hath a representative *Spacio*, by his Grant this shall clearly pass by this

*Dame Hales Case, &c.*

35 H. 6. fol. 12.

36 H. 6. f. 28.

24 E. 3. f. 7.

5 H. 7. f. 10.

24 E. 3. f. 7.

this name, if the same be known by it. 11 H. 6. f. 18. the King hath a Vicaridge, and presents unto it by the name of a Parsonage, and in this he mentions the right name of the Church; by this he hath now made this a Parsonage, 47 E. 3. fol. 5. plaito 9. Tho. Pens Case. The King presents to a Chappel, by the name of a Church; there by Belknap and Candish, although this was a Chappel, and of ancient time annexed unto a Church, and after divers Presentments and Presenters, there received to the said Chappel, as to a Church; by this the same is not now a Chappel, but a Church: And if so, the like shall it be in this Case. Also things which go in discharge, are easier discharged then Granted.

Mich. 38 &  
39 Eliz. &c.

Mich. 38 & 39 Eliz. The Lord Darcy's Case in a Quo warranto, he claimed to be discharged of purbeance; there it was resolved, that one may well be discharged from payment of purbeance, but the same not to be Granted by way of Grant; as if the King Grants over the purbeance of another, this is not good. Here the Dean of Pauls had such a Privilege Granted him to be discharged of Purbeance, for him and his Tenants for three Moneths, and by reason of this, the Lord Darcy did purchase of the Dean of Pauls the said three Moneths, and so would have the said Privilege of discharge: But it was resolved against him, because this was a personal Privilege, and did not pass.

Here in this Case there ought to be a continuing Citizen, and upon this, Walsley did put this Case, when the same was argued before. The King did Grant unto a Lord, the Amerciaments of all his Tenants, afterwards the Lord did alien the Seigneurie of one of his Tenants, he shall not now have the Amerciament of him; for that the Tenant ought to be a continual Tenant, or he shall not have the Amerciament of him; so here he ought to be a continuing Citizen, and as to this, the same is very clear.

19 E. 2. Fitz.  
tit. &c.

A Lord may well discharge his Tenant, that his Heirs shall not be in Ward, this is good by way of discharge, but not by way of Grant, as appears by 19 E. 2. Fitz. tit. Avowry, plaito 224. and 40 E. 3. fol. 47. but the King may Grant this.

It follows then here in this Case, that these Wines are the Goods of George Hanger, notwithstanding he be dead.

Stanford, fol.  
188.

It appears in Stanford, f. 188. F. That if an Executor, having Goods as an Executor, be outlawed, he shall not forfeit these Goods, for they are always, and so remain to be bona testatoris, and onely in Custodia Executoris; so that by this they appear still to be, bona Georgii Hanger.

11 H. 6. f. 7.  
&c.

It appears by 11 H. 6. f. 7. that one who is incapable to have any property in Goods, may yet be made an Executor, as a Poign; and so is Perkins, f. 11. plaito 51 & 12 H. 7. fol. 27 & 28. and by 14 H. 8. f. 16. b. A Poign may be the Kings Factor.

It appears by B. Acton, That there is mors Naturalis, and mors Civilis, and therefore this is usually expressed in Leases for life, (S.) durante vita sua naturalis, because he may enter into Religion, which is mors Civilis.

22 H. 6. f. 4. b. An Executor shall not forfeit the Goods which he hath as Executor, the reason is, for that they still are the Goods of the dead.

And by 21 E. 4. f. 50. a man makes a Will in his Executor, he shall not be enfranchised by the bringing of an Action against his Lord, for a Debt by him due unto his Testator, because he hath this to another use, for he doth so participate of the nature of his Testator, that if the Lord do answer him in his suit, without making of any protestation that he is his Will, yet this shall not be any Enfranchisement unto him, for he hath these Goods, and this Recovery is onely for the benefit and to the use of his Testator, and that these are the Goods of the dead; where it is for the benefit of the Testator, there the Goods in the hands of the Executor, shall be said, in Judgement of Law, to be the Goods of the Testator; but otherwise it shall be, where it may be to his prejudice, 14 H. 6. f. 14. Gargaffes case. That a

14 H. 6. f. 14,  
15.

lagery is no plea against an Executor, because all which he hath or recovers, is ad  
ulm



usum testatoris, and nothing be hath of these Goods to his own use, and the Executor, is but as the Attorney of the Testator: And here we are in a Case, which redounds to the benefit of the Testator.

For another reason these Wines here are to be discharged from payment of Prilage, in regard of the great danger that these poor men have undergone in the Pirigation: For sooth, that they in their return had met with Pirates, and the Owner had been killed in defence of himself and Goods, but the Ship escaped and came here into the Port; if now they should not be discharged of Prilage for these Wines, this were to adde calamity to calamity, and therefore they shall not pay Prilage for these Wines; they at the Sea, do adventure on the danger of Tempests and of Pirates, and therefore not to be ousted of discharge of Prilage for these Wines thus brought into the Port, with so great danger, which, as it were, carries death in the face, and shall now his interbient death prevent him from having benefit of this privilege, for his Goods to be freed from payment of Prilage, certainly it shall not: will you have him to lose his life in the Pirigation, and also to lose this privilege of discharge of Prilage, this should be very hard.

Another reason is, for the great danger which he undergoes for these Wines.

Again, if a Merchant Citizen of London, send his Ship with Wines hither into the Port, he himself being then beyond Sea, enquiry shall not then be made, whether he were then living, or not: Here they are his Goods, & vina Civium.

This Charter also was made, pro melioratione Civitatis: Also here is death in the Case, which is the act of God, and the rule of Law is, that the act of God shall turn no man to a prejudice: And notwithstanding here is not Civis, yet these Wines are vina Civium, and so to be discharged of Prilage. If George Hanger had sold these Wines to a Stranger, he should pay Prilage, for this was his own act.

38 H. 6. f. 28. Tenant per outter vie is disseised, no Action lieth for the mean profits untill he enter; but if cestuy qu' vie dies, he shall then presently have an Action for all the mean profits: the reason of this Case, comes to this Case in question: These Wines here, (though in the hands of the Executor) shall be said to be the Goods of the Testator, and as his Goods shall be discharged here of Prilage.

Also you will judge here of things in parts, which ought not so to be, but you ought to judge, super tota materia: Origo rei inspicere debet, not to judge here onely upon the last act, but we are to judge upon all; as in Dame Hales Case, there relation was to the first act, (S.) The first putting of his foot into the Water, and so it shall be here in this Case, to look to the first act, the putting of the Wines into the Ship, and then to have respect to all the subsequent acts, untill the coming into the Port and unloading.

Also George Hanger here was not the Grantee to whom the Charter was made, but the same was made to the Body of the City to have this privilege, and every particular Citizen takes the fruit and benefit of this Charter of discharge of Prilage: The Grant here was made to the Body of the City, and Hanger was no Grantee: And this was the great and principal reason in the case of Sittons Hospital, a representative Body good for Purchase.

The last and principal reason, is because this Grant here made was for the advancement of Trade and Traffick, and therefore this is to be taken and construed favorably and largely: And all Charters made which do hinder Trade and Traffick, are to be hold: Carta Mercatoria, 31 E. 1. the Law incorporated all Merchants Strangers, and enabled them to take of the King, or to give to the King; and to this purpose they are a Corporation: In the Register, f. 259. and in Fitz. Nat. Brev. fol. 227. there is a Writ upon 31 E. 1.

Carta Mercatoria, 31 E. 1. Register, f. 259. &c.

Here this Charter being thus granted for the advancement of Trade and Traffick, ought not to be construed after a vulgar and common construction.

The Infor-  
mation de-  
fective.

The Information also here is not good, for by this you will have Writage of all persons generally, whereas Strangers ought not to pay this: Also it ought to have been expressed in the Information, (*causa mercandis, & de rebus venalibus*) for this omission the information is not good.


Term. Trin.  
4 H. 6. &c.

This differs from Knowls Case, which was Trin. 4 H. 6. Rot. 14. where Thomas Chaucer miles, capitalis pincerna, did prefer an Information, &c. which was, *Quod cum a tempore, &c. usitatum fuit: De vinis mercatorum, indigenarum, venalium; but the Information here is, de quocunque (S.) de al enigenis; also qui non habent libertatem, quod sint inde quic i, duo dolia, and this called prima regia, because the same is due to him by Prerogative: It was there urged, that if he unlade before Writage paid, then the Kings Officer cannot have his election; in the Information there it was laid, that he had unladen the Ship before the Kings Officer had taken and made his election: It was urged for his discharge of Writage, being a Citizen, and these his own proper Goods: to this it was said, that he never was juratus ad libertatem London, prout mos est; Knowls then alledged, quod natus fuit, a Freeman, and was free of the Trade of Grocers, and that he did there keep a shop: The Kings Attorney said, that he himself was not there Commorant, for that his servant being there was no Commorancy for his Master; and also he was Inquilinus: This Case was in the Exchequer, and the Barons took consideration of it.*

Termin. Hill.  
43 Eliz. &c.

Termin. Hillar. 43 Eliz. Rot. 22. Sacheverils Case before remembered, where two Joint-tenants and Inmates kept no House, and therefore could not have the benefit of this Discharge of Writage; but in this Case here George Hanger was a complete Citizen in every respect, and so continued till his death, and these Writs in the hands of the Defendant Frances Hanger his Executrix, are bona Civium, and so within the compass of this Grant, to be freed from payment of Writage; and so upon the whole matter, Judgement ought here to be given against the King, and for the Defendant to be discharged from payment of Writage for these Writs.


TERMIN.



## TERMIN. PASCH.

13 JAC. Banco Regis.

The KING against Marsh.

 Enkins moved the Court for a Habeas Corpus, for Marsh a Prisoner, in the Prison of the Admiralty, and having been Indicted there for Piracy, and upon several Indictments, Ignoramus found: The Circumstance of the matter was this, Marsh was a Fisherman, and he being fishing at sea, was taken by Pyrates, and all which he had; afterwards they took another Ship of the Danes, and the Pyrates took the best of the provision out of his Ship, and of his Pen, and instead thereof, did put into his Ship some of the Goods of the Danes, and so suffered him to go away, and so he came and landed here, and went presently to Doctor Talbot a Civilian, and shewed unto him all this his Case, and then desired his advice herein; and according to his advice, he made an Inventory of all the Goods he had in his Ship, which were the Danes. Afterwards the Danes coming hither, did commence and prosecute Indictments against him in the Court of Admiralty, for Piracy; upon which Indictments, Ignoramus was found, and yet they there detained and kept him still in Prison; and upon this matter shewed, a Habeas Corpus was prayed for him.

A Habeas Corpus.  
1 Ro. Rep.  
175.

Coke chief Justice. If you had not opened the matter as you have done, then peradventure, upon the Ignoramus found, we would have granted a Habeas Corpus; but as you have now opened the verity of the matter (in which you have done well) we will not now grant you a Habeas Corpus, for upon your own shewing, we have very great cause now to suspect him for Piracy, and that he had his hand in this: A Pirate est hostis humani generis, and this is preda requissima. But now I will acquaint you further with a good Case lately in question, unto which I, with others, were called to Counsel, and the Civilians also, to declare and shew our Opinions, both for the Common and the Civil Law, the Case arising upon them both.

And the Case was briefly this: One Samuel Pelagii, a Subject of the King of Morocco, pretended that he was an Ambassadors, sent unto the States of the United Provinces; he came to them, and they accordingly did treat with him; afterwards he departed from them, and being upon the sea, he did take, rob, and spoil a Spanish Ship, and afterwards came hither into England: The Spanish Ambassadors here having notice of it, did take him, and would have here proceeded against him as against a Pirate, and imprisoned him; and to this Case, in the Vacation time, to shew our opinions herein, the Civilians, with my self and other Judges, were called for to declare, what was the Common Law and the Civil Law in this point, as touching this his intended proceedings, and whether he might in this Case proceed here against him as against a Pirate, or not: And at this time of

The Case of Samuel Pelagii, &c.



the Treatie, a great dispute was had as touching the several Privileges of an Ambassador: what the same are.

The Questions then said and affirmed, That an Ambassador hath others privileges to him allowed by the Law of Nature: As that their Bodies are not to be Arrested; also if they offend against penal Laws, as against the Statutes made for Apparel, &c. the like, his Ambassadorship shall excuse him; but not if he offend in Case of Treason, being an offence against the Law of Nature? But as Aristotle in his politics observeth, That Ambassadors is by the Law of Nature; and if he offend against this, his being an Ambassador will no ways privilege him; otherwise it shall be in other Criminal Cases. But we all answered, That at the Common Law he ought to be arraigned by the Statute of 28 H. 1. cap. 15. and not by the Law of Nature: But as touching the main point, Whether by the taking of Spaniards by the Morocco Ambassador, he a taking by him as a Pirate, or not, Whether by Judgement of Law for his doing of this he shall be adjudged to be a Pirate, and so to be proceeded here as against a Pirate; we did all agree, that by this taking he is not in Judgement of Law said to be a Pirate: In regard that the King of Spain, and the King of Morocco are Enemies, and that open Hostility is between them, and therefore this taking from an Enemy in this manner by the other, is not in Judgement of Law spoliatus sed legalis captivitas. And if an Enemy do take Goods of another, this is not Felony. And all this is well proved by a Case adjudged in point, in 2 R. 2. f. 2. where a Spanish Merchant, before the King and his Council, in Camera Scaccarii, brought a Bill against divers Englishmen, therein setting forth, quod de pcedatis, & spoliatus fuit, upon the Sea, juxta partes Britanniae per quendam virum Bellicum, de Britannia de quadam Navi, and of divers Merchandises thereon which were brought into England, and came unto the hands of divers Englishmen, naming of them, and so had process against them, who came in and pleaded, That in regard this depredation was done by a Stranger, and not by the Subjects of the King, and therefore they ought not to be punished; in regard that the Statute of 31 H. 6. cap. 4. gives restitution by the Chancellor, in Cancellaria sibi vocato uno Judge, de uno Banco vel altero; and by the Statute of 27 E. 3. cap. 13. That restitution may be made in such a Case, upon proof made by the Chancellor himself, without any Judge; It is resolved in this Case, quod quicquid extraneus, &c. who brings his Bill upon this Statute to have Restitution, debet probare quod tempore captionis, fuit de amicitia domini regis, and also quod ipse qui eum cepit, & spoliavit, fuit etiam sub obedientia regis, vel de amicitia domini regis, sive principis querentis, tempore spoliationis; & non inimicus domini regis, sive principis querentis. Quia si fuerit inimicus, & sic cepit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captivitas: prout quilibet inimicus, capit super unum & alterum, and this was the opinion of all the Judges then, in Camera Scaccarii. And so this Case there, resolves this Case now here in question, and well satisfies all. So that he cannot here proceed against him as against a Pirate, and yet he was still kept in Prison.

As to this present Case now in question. Coke chief Justice, and the whole Court agreed in this, (S.) That the Admiral may keep him here still in Prison for suspicion of Piracy, notwithstanding an Ignoramus found upon the Indictments; and therefore no Habeas Corpus is to be Granted in this Case, because he is in Prison for Piracy. The Court was then informed, that in the Court of Admiralty they had proceeded to trial against divers, for Robberies done upon the River of the Thames.

Coke, & curia, If this be so, this is unually done by them, for they have no such Jurisdiction, this being done infra corpus Comitatus, and so out of their Jurisdiction, but no Habeas Corpus was Granted in this principal case.

Habeas Corpus denied.  
Term. Mich.  
130 Jac. B.R.

Afterwards, (S.) Termin. Mich. 13 Jac. B. R. This Case between Samuel Pellagii, and the Spanish Ambassador, was moved again upon a Prohibition, prayed to stay proceedings against him in the Court of Admiralty, and against others; and as to this, the Case was, That he had taken from him upon the Sea, Jure Belli, a Span-

nish

with Ship, and sixteen Chests of Sugar; that he came hither, and sold them unto some English Merchants, against whom the said Samuel, the Spanish Ambassadors had libelled in the Court of Admiralty for these Chests of Sugar; upon which libel, these being lawfully taken, (as was pretended) and so enforced, Jure Belli, they moved for a Prohibition.

Coke Chief Justice. For the determining of this matter by the Order of the Council, a Conference was again appointed to be had, between my self and some other of the Judges, together with the Civilians, further to consider of this matter.

It appeared to us, that this Pelagius was a Jew, who took the Spanish Ships; and as one said, they sent their Pen Dons by Sea, tossing them over-board; they took also some English men, but to them they made satisfaction. The Spanish Ambassadors desired to have him tried by the Statute of 28 H. 8. cap. 15. as a Pirate.

Statute of  
28 H. 8. c. 15.

Upon this, the Civilians did argue, and shew what Privileges he should have, in regard that he was an Ambassador of the King of Morocco, and that jure natura, he was not to be punished for criminal Matters, as upon penal Statutes; but if he offended contra jus gentium, then he is to be punished as for Treason; this was resolved, that if he, contra jus gentium, acted, then, as before, proceeding to be had against him, as against a Pirate.

By the Statute of 28 H. 8. cap. 15. All Robberies done upon the Sea, shall be tried upon the Land; but then the same ought to be a Robbery, as appears by the Book before remembered, of 2 R. 3. l. 2. and upon the resolution of that Case, we did signify our Opinions unto the King, that he could not here be tried as a Pirate.

Then as to the Goods which were taken on the Sea, the Civilians held, that because he brought them, in solo amici, notwithstanding the taking of these was not felony, yet they may there deal civilly for them in the Court of the Admiralty, and he ought there to answer civilly, and therefore no Prohibition was to be granted.

Dodderidge Justice. If an English Merchant buys Goods of a Pirate, may not the Owner have remedy against them who bought these Goods; clearly he may, and here he may answer the Suit, as to the point of Restitution.

Moor Serjeant, prayed a Prohibition for those who lawfully bought these Chests of Sugar of Pellagius; upon the Libel, a Sentence was given for the Spanish Ambassadors: The Court all clear of Opinion, that no Prohibition was to be Granted, for then there was no remedy for him, and so a Prohibition was denied by the whole Court.

A Prohibition  
on denied by  
the whole  
Court.

### Quick, and Harris, Plaintiffs, against Ludborrow Defendant.

If an Action of Covenant for non-payment of money, the Case appeared to be this. The Covenant was, that a stranger should pay yearly 8l. to one of the Covenanters, and to one Frances Joyner a stranger; which Frances took to husband, one Backer, who did release this payment; The question was, whether by this release, by him thus made, the Defendant shall be discharged of this Payment, or not.

1 Ro. r. 196.  
An Action of  
Covenant.  
1 Ro. Abr.  
402.

It was urged for the Plaintiff, that by this release, he should not be discharged of the yearly payment: because that this release was made by one, who is a stranger to the Covenant, and cannot therefore by this his release discharge the same, but he shall be bound by his Covenant, if he do not perform the same, because by this his Covenant he hath taken upon him to doe it. Like the Case in 37 H. 6. l. 16. & 17. Sir John Birres case, who there brought an Action of Covenant, against one

William

William At-gate, who had granted unto him, by the same Indenture, for to marry with M. the daughter of the Plaintiff, before such a day, the which he had not done, unde actio. The Defendant pleaded, that divers times before the day, he did offer himself to the said M. but she refused him. It is there held, that this was no good Plea, and the difference taken, where he is a party to the condition, or Covenant, and where a stranger to the same, if he be a party, to whom the performance is to be made, and he refuseth; and the same pleaded, this shall be a good Plea, because it was his folly, thus to refuse it, otherwise it is, where the same is to be done to a stranger, who refuseth; this is no Plea, but it shall be accounted his folly, thus to bind himself, to perform this, which he cannot effect; and there by Prior, if a man be bound to perform something, which may lawfully be done, and by possibility; though the same be refused, by him who is a stranger to the condition, the party shall be charged, if he do not perform it, otherwise it is, where he which doth refuse, is party and party to the condition; this is there agreed by the whole Court. The reason, because the Defendant takes upon him to do it, and if the stranger do refuse, it shall be his folly thus to bind himself. And this appears to be so by the Judgement given, Coke 2. pars. fol. 3. in Masters Case, where the Defendant was bound, that his son (who was a stranger to the obligation) should do an Act, in which Case he hath taken upon him, that his son shall do this at his peril; for he which is thus bound, takes more upon him for a stranger, than for himself; and where by a condition a thing is to be performed to a stranger, as by a stranger, by this undertaking, there ought to be a punctual performance, as appears by 4 H. 7. f. 3, & 4. 27 H. 8. f. 1. Perkins in Conditions, fol. 146. plac. 756. 35 H. 8. Dyer, fol. 56. for where the thing is to be performed to a stranger, the same is there to be performed according to the words, and with this agrees Lamb's Case, Coke 5. pars. f. 23.

Coke 2 pars.  
f. 3. &c.

4 H. 7. f. 3, 4.  
&c.

Coke chief Justice. The payment here is to be to a stranger: If a man be bound, that I. S. a stranger shall enforce the Oblige, and he refuseth to take it, he shall take not the advantage of this; but if the Condition was to enforce a stranger who refuseth to take it, this is a forfeiture, because he hath taken upon him to do it; but the other to whom it is to be done, hath neither jus in re, nor ad rem, and this is very clear: and if a day be limited, As if a man be bound that another shall pay so much to I. S. at Mich. next, and he dies before, this ought now to be paid into his Executors.

31 H. 6. Fitz.  
tit. Bar. plac.  
59.

In 31 H. 6. Fitz. tit. Bar. placito 59. If one be bound to another that I. S. shall make him a House by such a day, or else to pay him 20 l. by such a day; it is no Plea for him to say, that I. S. was dead before the day, for that another might have made it; to this purpose is 15 H. 7. f. 19.

Buck here a stranger, to whose use the payment is to be made, he cannot release this, he having no right at all therein; and if his refusal shall be no discharge of this, his release shall not serve for it: If a feoffment in fee be made to the use of such a one as I. S. shall name, he cannot release this nomination; here the release is made by a stranger which hath nothing in the thing, nor yet any remedy to come by it; but for non-payment of this, the plaintiff to have his Action of Covenant; and therefore his Release here made is not good.

Doderidge Justice. This is neither debt nor duty in the party to whom the same is to be paid by Covenant, and a Release doth not operate, but upon an Estate. Interest, as right, none of which is here in this Case, and therefore his release is void. A Rent may be released before the day, but here he hath no Interest at all in him, and so his release not good.

Coke. If a man be bound to build a House for another before such a time, and he which is bound dies before the time, his Executors are bound to perform this.



Haghton Justice. If I devise that my Executors shall sell my Land, they cannot release this power.

Croke Justice. If the Obliger himself be the cause of the non-performance, he shall have no advantage of any forfeiture here; he which makes the release, had no duty at all in him, if he had dyed before the day, it had been good, and therefore his release here is void.

Dodderidge. The payment of this 8 l. a year was to be to them for forty years, if they or any of them should live so long; no duty here is in them, but a Covenant to pay: If one doth Covenant to pay so much to two, if this be no Interest, and one dies, then there is nothing to survive.

Coke. If a Lease be made, during the life of I. S. and I. N. or if an Estate be limited unto A. if B. and C. shall so long live; if one of them dies, he shall hold the same during the life of the Survivor, this being in a limitation; but otherwise it will be in a Condition, as it is resolved in Brudnells Case, Coke 5 pars. fol. 9. Coke 5 pars. f. 9. &c.

The Court was clear of Opinion in this Case, that the release here made by Buck, was a void release, and could not discharge the payment covenanted to be paid, and that Judgement ought to be given for the Plaintiff against the Defendant, for not paying of the money according to his Covenant. Judgement for the Plaintiff.

*Cryps Plaintiff, against Sir Harry Baynton,*  
Defendant.

**I**n an Action upon the Case for a promise, the Case appeared to be this, Such a one being a friend of Sir Harry Bayntons, and coming to the House of Cryps the Plaintiff in Cicester, and there arguing; this being an Inn, Baynton the Defendant came thither, and hearing of this, said unto Cryps, Provide for him such necessities as he shall want, & pro omnibus talibus necessariis, he did assume and promise to him here to solve; the Plaintiff in his Declaration shewes, that he had provided for him necessities, amounting to such a sum, the which he had demanded of him, and he to pay this did wholly refuse; upon which his refusal the Action was brought, and upon Non assumpsit pleaded, a Verdict given for the Plaintiff.

An Action upon the case for a promise. 1 Ro. Rep. 173.)

It was moved in arrest of Judgement, that the Declaration was not good, because he hath not shewed therein what necessities in particular he had provided for him.

Coke chief Justice. He hath here shewed the matter plainly, that he lay in his House in Cicester two moneths, in which time he had provided for him such necessities as he needed, amounting unto the sum of 15 l. the which, upon request made, he refused to pay; this is good, as it is here pleaded, for the avoiding of such multiplicities of reckonings, he was to finde him with all necessities, during the time that he was sick: The Plaintiff here sets forth, that he did provide him with these, amounting to so much, without shewing what these necessities were; the Declaration here is good, without any special shewing of this.

Dodderidge Justice. We have here before had this Case, One said unto a Physician, that if he did cure such a one of a fistilow, he did assume and promise to give him so much for his pains, after the cure was done, he refused to pay him the money: Upon this, he brought his Action upon the Case, grounded upon his promise, and in his Declaration shewed, that he had cured him of the fistilow; this was held good, without shewing all the several Medicines which he used about the Cure: This being then moved in arrest of Judgement, as here in this Case, but the same was over-ruled by the whole Court; so here in this Case, this general Alie.

Judgement in particular what they were, and so the rule of the whole Court was, *Quod iudicium intretur pro querent.*

*Brownlow* Plaintiff, against *Cox* and *Michil*  
Defendants.

An Assise.  
1 Ro. Rep.  
188.288.205.  
Mo. 842.

**I**s an Assise for the Superseas Office.

*Sir Francis Bacon*, the King's Attorney-General, moved the Court to have further time, (S.) fine of ten days for to plead.

*Coke* chief Justice. We are sworn for to maintain the Kings Prerogative. A farther time was then given him by the Court to plead, and a day appointed for the Trial.

Four Pillars  
of the Kings  
Prerogative.

*Bacon* Attorney-General. The Kings Prerogative hath four Columns or Pillars. (S.)

1. The first, which concerns the State, and Martial matters.
  2. The second, which concerns Ecclesiastical matters.
  3. The third, which concerns Judicial matters, in which these Warrants for the Superseas Office are.
  4. The fourth, which concerns matters of Commerce.
- And these four I shall ever maintain according to my place.

Nota, That *Sir Francis Bacon*, Attorney, being to move, a Serjeant at Law having a short motion, offered to move before him, at which he was much moved, saying, That he marvelled he would offer this to him.

Upon this, *Coke* chief Justice. No Serjeant ought to remove before the Kings Attorney, (when he moves for the King) but for other motions, any Serjeant at Law is to move before him: And when I was the Kings Attorney, I never offered to move before a Serjeant, unless it was for the King.

*Brownlow* Plaintiff, against *Cox* and *Michill*  
Defendants.

1 Ro. r. 188.  
288.  
Mo. 842.

**A**s to this Case of the Assise. At this time, for stay of the suite, *Sir Francis Bacon*, the Kings Attorney General, did present the Court, with a Writ De non prosequendo Rege inconsulto.

*Coke* chief Justice. These Writs are usual, and frequent in the old Books of Law, as in the first, and second part of King Ed. 3.

At this time, the Attorney General, and the Kings Solicitor came to the Judges, and the Attorney said unto the chief Justice, and to the rest of the Judges: That the King did greet them well, and as to this Assise. Jure Regali, being a thing which concerns the King, and his Prerogative, that they were not further to proceed in this: And so he delibered to them, to this purpose, this Writ, De non ulterius prosequendo Rege inconsulto, The which Writ they received, and by their command it was read. Afterwards, *Brownloes* Counsell moved the Court to have a Copy of the Writ, and time to speak unto it; this being a new President. And this was granted by the Court.

*Coke*. Such Writs are not new, but have been very usual, and frequent in our old Books, as before.

*After.*

Afterwards, at another time.

Harris, and Hutton Serjeants at Law, d'd move the Court, as touching this Writ of *Prerogative*, *De non prosequendo Rege inconsulto*, and moved the Court for the Plaintiffe, to have proceedings in this Writ; this Writ notwithstanding.

It is a good rule in Law, where the matter in question doth touch the King, either in interest, or in property, if such a cause be shewed, then the cause is to stay quousque, &c. The Writ here contains two Patents, The first is, 9 Januarii, 7 Jac. comprehending this matter, (S.) first, that the King out of his Royall power, by vertue of his *Prerogative* regall had erected an Office, for the Writs of *Superedeas*, quia imp. ovide, &c. and in the C. B. (This is Novella) after the order of Officers, to be inrolled, and that Sir John Michill should have the execution of this, for his life, and the fees appointed for the Execution of this, &c. Then Sir Francis Bacon, the Attornee Generall did pray the Serjeant for to spare his speech, saying, that he did not thus interrupt him without cause, But he would shew good cause wherefore he ought not to be heard; This is a very great case, and doth greatly concern the King, in point of *Prerogative*, and that he were better to lose his Castle of Windsor, then to lose this his privilege of Inhibiting Proceedings by this Writ, *De Non prosequendo rege inconsulto*; and the ayde prayer of him.

I shall first observe, the nature of this Writ, and other Writs of this nature, are conditional. (S.) if the Judgement be not, &c. But this Writ is not so.

Another Writ there is of this nature, and mingles this, with a circumspecte agaris: this referring to the consideration of the Court. But this Writ here, is none of this. For this Writ, is not, *Si vobis contare poterit*. But this is an absolute writ, inhibiting them, from proceeding ulterius rege inconsulto. And so this writ is a *Probelty*, as it hath been said. But we will not bring in any *Probelties*; these we will not maintain. In this Case you ought not to be heard against the King, but we do expect the direction of the Court herein. Heretofore, in Arden, and Darcy's case the like motion was offered to be made against such a writ of the King, as this is, and it was one Harris then also, who offered to make this motion, (so that I think this is incident to this name,) but the Court did then refuse it, as here I hope they now will doe.

Arden & Darcy's Case.

34 & 35 Eliz. The Lord Glofields Case, &c.

Coke chief Justice. We which are Judges, ought to hear the Counsell of the party, and this we are to doe without any colour of question. The reason of this is, because that his suite, by this is to be stayed, and this being in a legall course, his Counsell for him, ought to be legally heard in 34 & 35 Eliz. the Lord Glofields Case, the parties were Kent against Arundell, where the like writ came *De domina Regina inconsulta*, *Non prosequendo*, and there the Serjeants did argue, that this writ did not lye, but there was no dispute at all, whether they might argue this or not, this being to be so, without any question; for this is a legall course, and this writ also, is ancient, and legall.

Coke & Curia. We have read, and weighed all the Books in this, as 2 R. 3. fol. 13. John Hunstons Case. 21 E. 3. fol. 19. & 44. 22 E. 3. fol. 15. 15 H. 7. fol. 10.

Doderidge Justice. These things happen in our Books, and this matter hath been divers times debated before.

Coke. My Warb is, for to serve the King, and his People; here these are not to pray in aide. So writ of this was ever as yet brought, but this was then disputed; as touching the validity of the same writ.

The Court all agreed herein clearly. And so by the Rule of the Court, this Case was adjourned to another time, and then to hear Counsel on both sides, to argue the same; for and against this Writ, and the allowance, or disallowance of the same.



Afterwards (S.) Termin. Trinit. 13. Jac. B. R. This Case was largely, and learnedly argued, by Harris Serjeant, Hutton Serjeant, & Richardson Serjeant, who argued strongly against the Writ, and the allowance thereof: and by Chibburn Serjeant, and by Yelverton the Kings Solicitor, for the Writ, and the allowance thereof. And a farther time given to Sir Francis Bacon, the Kings Attorney General, to argue for the maintenance and allowance of the same, before which time, the Attorney General being ready to argue, the matter was composed between the parties, and so ended without any further argument, or opinion of the Judges herein onely so far, after the end of Serjeant Chibburnes Argument, who then prayed to have allowance of the Writ, by the Court, as to this.

Coke chief Justice. After the allowance of this Writ, we cannot then proceed again, without having, 1. A Procedendo, ad loquendam, &c. 2. A Procedendo ad Judicium; and without these Writs, we cannot proceed; and this is the Law, as touching this Writ, and the allowance of it.

Dodderidge Justice, agreed herein, that after allowance of this Writ, we ought to have two Writs of Procedendoes before we can proceed.

Now, That after the end of Yelvertons Argument, who concluded praying allowance of the Writ.

Sir Francis Bacon then said, That this Writ is as a Watchman to the King, and as a Centinell to give Warning. This Case was ended, as before, without any Judgement given therein by the Court, one way or other, but large and confident Arguments on both sides.

Ended by  
Agreement.

### *Parflow* Plaintiffe, against *Dennis* Defendant.

A Prohibition.  
on.  
1 Ro. Rep.  
190.

**I**f a Prohibition, to the President, and Counsell in the Marches of Wales; The Case appeared to be this; That one Dancy, being seized of Land in Fee-simple, of this makes a Lease for 1000 years, in the time of King H. 8. unto one Dennis, which came to his Executor, and the same hath ever since from time to time, been enjoyed by Executors, untill the heire of Dennis pretending title to this, as heire, commenced there a suite for this Land, and had caused divers offices to be found of this, in the Court of Wards, that this was Fee-simple; and upon this, the Vice-President of Wales, had proceeded against him, who had the Lease, and had seized the heire in the possession, as of Fee-simple Land, had removed the termor out of possession; and hath also there sentenced against him, for the heire, 20 l. in damages for the mean profits; Upon this a Prohibition was prayed.

It was shewed, that this matter was now in the Court of Wards, and divers offices found of this, that Dennis dyed seized of this Land in Fee, and that dissent have been had of this, and that upon these offices thus found, the Vice-President and Counsell there, had removed Parflow out of the Possession, and had seized the heire in the same, as heire.

Coke chief Justice. You now come hither too late to have a Prohibition. If it had been, as you say, that this Land had gone, for these 100. years, from Executor, unto Executor, this had been then clear for you, that it was but a terme. But here otherwise it is, for this hath gone contrariwise, from heire to heire, and offices have been found of this accordingly; and therefore, it is to be presumed, that this was Fee-simple Land, and not a Lease for years. Also the Vice-President, and Counsell here, have done nothing, but what was well done, for this which was done by them, was onely for the quietting of the Possessions, and this was well done. And that the heirs of Dennis to enjoy this untill the right of this should be determined by the Law. But they have here gone farther, and have also given 20 l. damages for mean profits; In this their so doing, they have not done well; for this is the absolute determining of the Title, to be for the heire; and this they cannot there do: and therefore, as to this particular, their proceedings are not right;

right; but as to that which they have there done, as to the settling of the possession, this is well done by them, and the same shall stand; but as for their Sentence, of 20 l. damages, for the mean profits; this we will stay, but no more; and so as to this particular, A Prohibition was Granted, by the Rule of the Court.

A Prohibition upon the case for a promise.

### Lea Plaintiffe, against Adams Defendant.

**I**n an Action upon the Case for a promise, for a Horse, the Plaintiffe in his Declaration sets forth, that the Defendant had made a promise unto him, in manner following. (S.) that if the Plaintiffe would make him a Lease for 21. years, of certain Land, for 10. l. yearly Rents he did then in Consideration of this, assume and promise to give unto him a Horse, and shewes that he had made unto him a Lease for 21 years of the said Land: That the Defendant, according to his promise, had not given him the Horse, but to doe this refused, whereupon, the Action was brought up, on Non assumpit pleaded, a verdict was given for the Plaintiffe. It was moved in Arrest of Judgement, that the Declaration was not good, to intitle the Plaintiffe unto this Action, he having here set forth, a Lease made generally, making mention of no rent reserved upon this Lease, whether this Declaration be good or not, was the sole question. It was urged for the Plaintiffe, that the Declaration was good, though no Rent was reserved upon the Lease, this being for the greater benefit of the Lessee, and therefore good, the Lease being made of the same Land, and for the same term agreed upon between them.

An Action upon the case for a promise.

Haughton Justice. The Declaration is not good, the rent agreed upon, being not mentioned, to be reserved, and he having expressed no rent in this, he may have reserved a greater rent upon the lease, then was agreed between them, that he should doe.

Coke chief Justice. Clearly this cannot be so intended, being an affirmative, the which for a Rule in Law ought never to be intended, but to be proved so to be. But as to this Declaration here, that he had made a Lease unto him Generally, this ought to be intended by the Law, to be a Lease, without any rent thereon reserved; so that the point here only is, whether this Lease, as it is made, may be intended to be a Lease made upon the same contract, upon which the action is here grounded. For the Jury have found, that he did assume and promise, prout.

Doddridge Justice. If such a promise had been made to a Tenant in tail, as to say unto him, if you will make me a Lease for so many years, before the Statute, or now, since the same, at such a Rent, and I will give unto you a Horse; he brings his Action upon the Case for this, and in his Declaration averreth, that he had made him a Lease for so many years as was agreed upon between them generally, and saith nothing of any rent reserved; this is not good, for if he made this Lease, reserving Rent, then the Issue in tail by his acceptance of the Rent, might make this good; otherwise it is, where no rent is reserved, for there the Lease is void against the Issue, and cannot be made good, by any acceptance, being void before, as appears by 22 H. 8. Brooke title Acceptance, pl. 10. 14. But to put this doubt out of question, it was answered, that this was free-simple Land, and no estate tail.

22 H. 8. Brooke title Acceptance, pl. 10. 14.

22 H. 8. Brooke title Acceptance, pl. 10. 14.

Coke. The doubt in this case, is not, whether this Lease being made without any rent reserved, shall be for his greater benefit, or not, but the Contract here being, to make him a Lease, with a rent reserved, when he hath here made unto him a Lease, without any Rent, whether this shall now be taken and intended to be a lease well pursuing, the original contract between them or not. As to this, it cannot be so intended to be a Lease, pursuing the contract, as it is here alledged.

Croke and Haughton Justices. If one saith to another, make me a Lease for 21. years,

years, and I will give you a Horse, and he makes him a Lease for 60. years, this is more for his benefit, & omne majus, continet in se minus; yet he shall not here have the Horse, because that by this, he hath not (as he ought to have done) precisely pursued the body of the consideration, in his terminis, which intitled him unto the Horse.

Coke. If one saith to another, go, and doe me an arrand at York, and I will give you for your pains, 40 s. and he afterwards hearing, that he dwelled some few miles on this side York, said unto him, doe this arrand for me, at your house, and this shall suffice; yet, this notwithstanding; if he do not go to York, and doth his arrand there, according to the contract, upon which the promise was grounded, he shall never have the 40 s. for that he hath not pursued the body of the contract. So here in this principal case, the sole question is, whether by this Lease made without any rent reserved, he hath pursued the body of the contract, upon which the promise here was grounded, the which was, to have made such a Lease, at such a rent.

The whole Court clear of this opinion, that by this Lease thus made, without any rent reserved, he hath not pursued the contract: and so by consequence, the Action not maintainable by the Plaintiff, for this Horse, & quod querens Nil capiat per Billam.

### Termin. Trin. 13 Jac. Banco Regis.

*Richard Harris Clerk, Plaintiff, against William*

*Austin Defendant.*

Entred Hillar. 12 Jac. B. R.

Rot. 1315.

A Writ of Error upon a Judgement, &c.  
1 Ro. Rep. 210.  
2 Ro. Abr. 360, 374.

**I**F a Writ of Error to reverse a Judgement, given in the C. B. In a Quare Impedit there brought, by Austin Plaintiff, against the Bishop of London and Harris, for disturbing of him to present to the Church of Bradwel, in Comitar. Essex, juxta mare, and for his Little shewes, that Sir Edward Pincheon, being seised of the Advowson in fee, of the same Church; which Church being void, he did present one Genge unto it, and afterwards he Granted the first and next avoidance thereof unto the Plaintiff in the Quare Impedit; that afterwards, (S.) 19 Septembris, 10 Jac. the said Genge dyed, so that it belonged to him to present, that the Bishop and the Doctor had disturbed him, upon which disturbance, the Quare Impedit was brought. To this they appeared and pleaded; the Bishop pleaded, that he had nothing but as Ordinary, (S.) Admission and Institution: Harris pleaded a special plea, (S.) That he was persona imparlona, of the Church in Question, and shewes for Title, that King E. 6. was seised of this Advowson; and 7 Maii, 4 E. 6. he granted this unto William Herbert miles, and afterwards Earl of Pembroke: That he Granted this unto one Cox and his Heirs, and this was 10 Maii, 4 E. 6. afterwards King Edward the Sixth dyed, and Queen Mary took the Realm upon her, & Coronata fuit.

Coke chief Justice. I never saw such a pleading.

Afterwards the Church became void, by the Deposition of Peaking, then Incumbent, and that Queen Mary, (usurpando upon Cox) did present one Thomas Wood, who was in by six Moneths.

Dodderidge.



Dodderidge Justice, observed, That there was no time helmed in the Bar, when the deprivation was, nor yet when the Presentation of the Queen was.

Afterwards the Church became void again, by the Resignation of the said Thomas Wood: And then William Herbert Earl of Pembroke, usurpando upon Queen Mary, did present George Mason.

Coke chief Justice. Here are so many Usurpations in the Bar, as Presentations, but yet there is no Usurpation in this Case, but only of the Plaintiff in this Writ of Error.

Afterwards the Church became void again by the death of Mason, and that William Harbarr, usurpando upon Queen Eliz. did present one Debauk; but before the death of Mason, Queen Mary dyed, and the Crown came to Queen Elizabeth: Afterwards William Harbert dyed, by whose death the Abbotsdon descended and came to Henry Harbert: Afterwards Debauk the present Incumbent did purchase the Abbotsdon to him and to his Heirs, of Henry Harbert: Afterwards Debauk made his Will in testifying, and by this did devise the first Presentation unto William Tabor, and after to Thomas Tabor: That afterwards Cox devised the same to Thomas Tabor: afterwards the Church being void again, Cox & Debauk, usurpando upon Queen Eliz. did present Tabor: Afterwards Queen Eliz. dyed, and the Crown came to King James, and the Church being void, Sir Edward Pincheon, usurpando upon the King, did present Genge: that afterwards it belonging to the King to present, he presented Harris the Plaintiff in the Writ of Error.

To this plea in Bar, Austin the Plaintiff replied, and by this lets forth, that before King E. 6. had any thing in this, that King H. 8. was seized of the said Manor of Bradwell, unto which the Abbotsdon of this Church was appendant; and 35 H. 8. He Granted this unto Queen Katherine his Wife for her life, and the King being seized of the Reversion, Queen Katherine did present Peaking; afterwards the Reversion descended, and came to King E. 6. who Granted this to William Harbert Earl of Pembroke: Afterwards by the death of King E. 6. the same came to Queen Mary, who 7 Mai, 1 Mar. usurpando did present Wood; that for this, William Harbert brought his Quare Impedit in the C. B. against the Bishop of London, and Wood; and Wood having no title, suffered a Judgement to pass against him, for William Harbert, by a Non sum Informatus, and a Writ to the Bishop, by which Wood was debito modo amicus: Afterwards William Harbert did present Mason, the Church became void again, and he then presented Debauk: Afterwards the Earl of Pembroke dyed, and by his death the same came to Henry Harbert, who made the Grant unto John Debauk, as before; Debauk then made his Will, as before, and made three Executors, and willed, that they or any two of them, should present William Tabor to the said Church upon the next avoidance, and afterwards to Thomas Tabor; William Tabor refused the Execution of the Will, Thomas Tabor Grants the Abbotsdon to James Norris, and to Edward Leawcknor, and to their Heirs, who Grants this unto Sir Edward Pincheon; the Church became void by the death of Tabor, afterwards he Granted the next avoidance unto Austin the Plaintiff, in the Quare Impedit, the Church became void, so that it belonged to him to present; the King presented Harris here in the Writ of Error, upon which Presentment the Quare Impedit was brought, with a Traverser, that William Harbert did not Grant the Abbotsdon unto Cox: Judgement by this Case was given in the C. B. for Austin the Plaintiff in the Quare Impedit; upon which Judgement a Writ of Error was here brought by Harris the Plaintiff.

Note, That in this Case, all the Counsel for the Defendant were seized with an Injunction: the Judges then answered, That they would be of Counsel for the Defendant.

Coventry for the Plaintiff, in the Writ of Error: The first Error assigned was, That Termin. Trin. twelbe Jurors, and no more, did appear: This (ex officio partium)

partium) was adjourned untill Crastin. Animas. on which day, two others came in and were sworn, being of the first panel.

The Court all clear of Opinion, that this is no Error, this being good enough, they being all to be called again.

A second Error assigned, because it was not here shewed, that there was any Writ to the Bishop to remove the Clerk.

Coke chief Justice. This is no Error, the Writ to the Bishop is not to remove the former Clerk, but it is non obstante reclamations of the Incumbent: These two things are recovered in a Quare Impedit. 1. The Patronage. And 2. The Presentation.

Dodderidge Justice. If he agree that the Incumbent shall have this, he shall have his Patronage: You cannot here say against him, Non obstante reclamations, when as a Nihil dicit est nulla clamatio.

Coventry, in 6 E. 3. f. 23. A difference there appears to be, between a Recovery in a Writ of Right of an advowson, and in a Quare Impedit.

Coke. He may present him without any Writ to the Bishop, after Judgement he is debito modo amovus: The Writ to the Bishop, is but an Execution of the Judgement: If the King usurps upon me, if I usurp upon him again, and present, and my Clerk is in by 6 Months, I am now remitted: And so it was adjudged in Dyer's time, upon Fitz Herberts Case, because his Clerk was legally in by 6 Months, and so a Remitter which shall bind the King: he was amovus by the Judgement, and might present without any Writ to the Bishop.

Dodderidge. If one presents unto my Benefice, and I bring a Quare Impedit against the Ordinary, and the Disturber, and leave out the Incumbent, yet by this I shall recover my Patronage, but not to remove the Incumbent.

Coke agreed herein, when there is a certain Recovery by the Judgement: And so the Court over-ruled this Error.

A third Error: It is set forth, that 7 Junij, the Recovery was had in the Quare Impedit, but both not shew, that the same was brought within the six Months after the Usurpation.

Coke. This is no Error.

Dodderidge. The other Errors are not material: In the Bar here you do plead, that this Advowson was in King E. 6. who Granted this unto the Earl of Pembroke, that Queen Mary usurped: It is onely shewed, that the Clerk was in by six Months, but both not shew, that the Presentation was within the six Months.

Coke. Omnia presumuntur, solemniter esse acta: It may be that the Quare Impedit brought against Cox, was within the six Months, and it may be not, but Judgement follows upon it, and therefore it shall be taken and so intended, that the Quare Impedit was brought within the six Months.

Dodderidge agreed with him herein.

Haughton Justice. King E. 6. did Grant this to the Earl of Pembroke: Queen Mary usurped by Presentation, and her Clerk in by six Months: A Quare Impedit then brought, by this the Usurpation of the Queen is purged. Coke. The reason of the Remitter is, because he comes in by admission and institution, being Judicial Acts, and therefore remitted: Admit that the Recovery had been in the time of King H. 4. that Piercy usurped, and afterwards a Quare Impedit brought, and a Recovery had of this, will you now have it hunted out, whether this Quare Impedit was brought within the six Months, this ought not to be, being upon an uncertainty: and we ought always to presume, that this was all well done, and according to the Judgement, for that in such a Case, Omnia presumuntur solemniter esse acta.

If a man both purchase an Advowson, and so hath the Presentation, one usurps upon the Purchaser, and his Clerk is in by six Months: A Quare Impedit is then

then brought, and passeth by a Nihil dicit, the Bishop, Nihil clamat, the purchaser shall have his right.

Dodderidge agreed herein, for that we are to presume pro sententia.

Coke agreed, the rule to be so; for that Judicium, est juris dictum; sicut veredictum, est dictum veritatis & res judicata; pro ratione, as Bracton, and this Judgement, *Bracton.* is not to be intended to be contra jus. In all causes, where one recovers in a Quare Impedit, against a common person, if he names the Incumbent, he shall then recover against him; and in this he shall recover against the Queen, because he cannot name her; And if this had been in the time of King H. 4. all had been one, for we ought to make such intendments, as thereby we may maintain the former Judgement given.

Nota, That afterwards, on another day, in this term, this Case was solemnly argued by all the 4 Judges.

Haughton Justice. Two errors have been assigned for the reverting of this Judgement, which are worthy to be remembered. Another error hath been moved out of the Record; But notwithstanding all these errors, the Judgement given in the C. B. was well given, and the same ought here to be affirmed; there being no error in it: It hath been alledged, that this Church became void, by the deprivation of Peaking, and no time shewed when this deprivation was; and that afterwards VWood was presented, and in by 6. months. It is shewed that the Quare Impedit was brought 7 Junii, primo Marie, by VWilliam Harbert, against the Bishop, and VVoods exception hath been taken, because it doth not appear, whether this Quare Impedit was brought within the 6. months, or not? VWood being in by 6 Months: if it was brought out of the 6. Months, then by this, there is no avoidance of the usurpation by Queen Mary: there is no time, when the institution of VWood was.

The Plea here, shall be taken strongest, against him, who pleads it.

The Replication of Austin here, makes against him, that this was after the six months. Yet notwithstanding all this, the Judgement is good, and was well given; and we ought here to intend, that this Quare Impedit, was brought within the 6. months.

It must be agreed, that every plea is to be taken strongest, against him, who pleads it; as in 3 E. 4. fol. 21. Debt brought against one, and counts upon the return of the Predecessor of the Defendant, in office of the barly of husbandry, for 40. s. a year, that he did the services, to the Predecessor, which came to the use of the house; and that for so many years, he was behind, and unpaid; they were at issue, and found for the Plaintiff, but Judgement stayed, because he did not alledge by whom he was retained, and so uncertain, and for this cause the Declaration there not good. Yet it is not requisite for a plea in barre to be certain, to all intents. If it be uncertain, in the thing alledged, it is not good.

In this case here, the Quare Impedit, is grounded upon the disturbance, and the being in by six months, is but an inducement, and therefore is not so certainly to be alledged. For this is a thing subsequent, and matter in fact, and therefore not to be averred in the allegation, in the point of the Action, the same being grounded upon the disturbance: but this ought to come on the other side, and shall be intended to be rightfully brought, especially being pleaded, as here it is, that a Judgement was given, and therefore shall be intended, to be truly and rightfully given.

It is here said, that the Incumbent, suit debito modo amotus, by the Recovery; and by the Judgement of the Court; and execution had accordingly; therefore it is implied, that the Action was brought within the 6. months; for if the Quare Impedit, had been brought, after the six months past, the Incumbent could not then have been Legitimo modo remotus, and therefore this ought to be intended, that this was well, and in due time brought. And when they went to issue here, and



Object. no exception at all taken to this, for this ought materially to have come, and been shewed, on the other side. It is alleadged, by way of Objection in the Bar, That Wood, who was presented, was in by 6. moneths, and that therefore if the Plaintiff would avoid this, by a Quare Impedit, he ought to have shewed, that the same was brought by him, within the 6. moneths, and that the other matter ought to have been traversed. In answer to this. By this Barre of the Defendant, the title of this Advowson is conveyed to Cox; and this allegation in the barre, that V Wood was in by 6. moneths, is idle, the same not being there materiall, and therefore as to this, no answer was needfull.

Resp.

Resp.

If a man do plead a deed of release, and that I. S. who made it, at the time of the making thereof, was of full age, and the other saith, that he was within age, he needeth not to traverse with an absque hoc, that he was of full age: In the barre here, this allegation was surplusage, and idle, and so here, in regard that he lays the Quare Impedit to be brought upon the disturbance, a Replication to this, and upon this Judgement given in Court: Therefore it must necessarily be intended, that the Incumbent was by this lawfully removed. Another answer may be given to this, that notwithstanding he was in by 6. moneths, yet when the Quare Impedit is brought by him, who hath right after the 6. moneths, he by this shall reduce his right, but this is not much to be insisted upon, the same being doubtfull; but the other matter before urged, is to be relied upon.

As to the exception taken to the devise, this is of no force at all. (The Will was, that Executors, or any two of them, to present one,) a man may devise, that his Executors, shall devise, to such a man, (Debanke was here presented: the authority here remained jointly to them, notwithstanding one of them had right to the advowson; And so upon the whole matter, the Judgement given in the C. B. was well given, and ought to be affirmed.

2.

Dodderidge Justice. These errors have been alleadged; the first appears in the Barre, when the Church became void by the death of Peaking, and upon the Grant to Cox, Queen Mary presented V Wood, who was admitted, instituted and inducted, and in by 6. moneths, here the purchaser had not the presentment, but the patronage passed unto Queen Mary, by usurpation. It must be agreed, that if the Queen, or any other, do usurp, upon a purchaser, before any presentment made by him, and in 6. moneths passe, and no Quare Impedit brought; the usurper by this hath gained the patronage in fee; and the purchaser remains without any remedy, for before the Statute of V Vestminster, the second, capite 5. a plenary by 6. moneths had defeated the purchaser perpetually, and a purchaser is not within the scope of that Statute. The which Statute doth recite two Writts of Possession, (S.) Quare Impedit, and an Assise of advowson presentment. And one writ of right, (S.) Breve de Rectore. And a purchaser cannot have any possessory Action, for that he cannot alleadge a presentment in himself, as he ought to doe, in his count: And he cannot have a writ of right, because he cannot alleadge seisin in the esples, as he ought to do by the Law. And these are the 3. remedies which he may have, and no other, as appeareth fully by these Books, (S.) by 7 E. 3. fol. 246. 16 E. 3. Fitz.

Stat. of Westminster. 2 cap. 5.

7 E. 3. fol. 246.  
16 E. 3. Fitz.  
&c.

43 E. 3. fol. 15. 43. lib. Assisar. fol. 21. 19 H. 6. fol. 40. 20 E. 4. fol. 150. 22 E. 4. fol. 9. 1. By all these Books it appears, that if the purchaser do never present, to the Church, but suffers a usurpation, and the Incumbent of the usurper, to be in by 6. moneths, by this he hath now lost his right of advowson, and the same is now become a right remediless. But if a purchaser do present once, and afterwards, at the next avoidance, a stranger presents, and his Clarke is in by 6. moneths; by this his right is not gone, for if the Church becomes void again, he cannot have a Quare Impedit, but a writ of droit d' advowson, for he hath right of action, and of advowson, 7 E. 3. fol. 1. in the end of the case, it is there said, that if the Grandfather doth present, and the right of advowson descends to

6 E. 3. fol. 1.

to his son and heire; Afterwards another presents, after the son presents, it shall be rather adjudged that he presented in his own right, then in the right of another, this there by Bister, who said, he had known it so adjudged. 17 E. 3. fol. 37. b. by Par-  
 ming, at the Common Law, purpise of one shall not put another out of his posses-  
 sion, and when one presents, who can intend, that he presents by any way, then by  
 such a way, as he hath title, and colour for to claime by, for if one do purchase an  
 abbotsion, and presents, he presents by force of his purchase, in his own right; and  
 if afterwards another purpant, and then he again happens to get a presentment,  
 this shall be intended to be in his ancient right. L. 5 E. 4. fol. 119. b. in the Abbat  
 of Leicesters Case. It is there said, That if the King presents to the abbotsion of  
 another, and is seized, and after the Church becomes void again, and the other pre-  
 sents, and his Clarke is in, he is now in his possession again, and by this, he hath  
 regained the patronage. (But I do doubt of this, if it be in the case of a purchaser,  
 there being no Book in it,) for that here is his mere negligence, and laches. And  
 this shall suffice to be spoken to the Barre.

17 E. 3. fol.  
37. Par-  
ming.

L. 5 E. 4. fol.  
119. b. the  
Abbat of Lei-  
cesters case.

Now to the Replication here, and to examine this.

First, All matters in law, ought to be confessed, and avoided, to be traversed, or  
 protestation to be taken of this.

But here are divers matters alledged, in which there are many oppositions, the  
 one being contrary to the other.

The one saith, that the Church became void, by the resignation of Wood. The  
 other saith, that it became void by the amotion of Wood, without any traverse. All  
 this being matter in law; but yet notwithstanding all this (which is not much ma-  
 teriall,) they being here at issue, here is no formal pleading. But now to look unto  
 the right. And as to this, by the Replication, Queen Mary did usurp, by presenta-  
 tion, as appears, presented Wood; But William Herbert had the right of Patronage,  
 and brought his Quare Impedit to all, a Non sum Informatus pleaded for Wood, and  
 a Judgement passed against VWood, and so he was lawfully amoved: if in by 6.  
 moneths, and a Quare Impedit brought against him. If by this he shall recover  
 the Patronage.

As to this, it is first alledged in the Barre, that Queen Mary usurped, usurpando,  
 she presented Tho. Wood, who was admitted, instituted, and inducted, and in by  
 six moneths.

Whether Cox, a purchaser of Herbert, and never presented, yet if he brings his  
 Quare Impedit, within the 6. moneths, by this he hath undone all, which Queen Ma-  
 ry had gained, by the usurpation. But if this was brought after the 6. moneths,  
 Quid operatur by this.

Two especiall points are here to be considered. (S.)

First, Now this case stands upon the pleading of plenarity. This is alledged to  
 be in the presentment of Queen Mary, but it is not alledged when this presentation was;  
 and this may be in the beginning of her Reigne. But when the Quare Impedit is  
 brought, it is said to be in 1 Maria, and he may be in by six moneths before, but  
 this doth not appear, and so this is uncertain, for it may be the same was brought  
 within the 6. moneths, and it may be, it was after; it is now to be considered, what  
 we shall here intend, upon this so uncertain a Barre, and Replication.

As to this we ought alwayes to intend that to be done, which stands with the  
 Judgement given. And where it is said, that he was by this, Legitimo modo amo-  
 tus, we ought to presume, all things to be lawfully done, to maintain this Judgement;  
 and still we are to presume the best, for upholding of the Judgement; to this pur-  
 pose is the case in 36 H. 6. fol. 17. a. by prior, if one recovers, against another, the  
 Manor of Dale, and three Acres of Land, by default, in a precipe quod reddet, and  
 afterwards he brings a scire facias, to have execution of the said Judgement, he  
 shall not say that the 3. Acres, are parcel of the Manor, for that it cannot be so in-  
 tended. It is there said, that if a fine be levied of a Manor, and of three acres  
 of

36 H. 6. fol.  
17. a. Prior.

of Land, It cannot be any wayes intended, that these thre acres, are parcel of the Manoz, otherwise it is where a Fine is levied of a Manoz, and of an advowson, where it may be, that this was parcel of the Manoz, and it may be not so; and so is the difference there put by Danby.

It is a Rule, *Quod semper præsuntur, pro sententia*, as if a doubtfull sentence be given in the Ecclesiastical Court, we ought for to presume the best. As in Buries case, Coke 5. pars fol. 98. b. and 2 Eliz. Dyer, fol. 178. Two Judgements there, the first Judgement upon the libell, in the Spirituall Court, that he was frigidus, and upon this a sentence of divorce was given accordingly; in the sentence it is said, that he was frigidus, generally, whether this shall be understood, and intended, that he was Maleficiatus, and so inhabilis uni, & habilis alteri, or whether it shall be intended, that he was naturally frigidus, but afterwards, because he had a second wife, and had issue by her, therefore it shall be intended, that the first Judgement was, quia maleficiatus. So that semper præsuntur pro sententia, notwithstanding proof be to the contrary. 18 E. 4. fol. 29. In trespassse, for cutting his Grasse, and breaking his close, the Defendant claimes the Land, as son and heire of J. S. the Plaintiffe saith, that there was a divorce between J. S. and his wife. In this case the best shall be presumed, and this shall be for the legitimatation of the heire, and so it is also said in Burges Case, *Quod semper præsuntur pro legitimatione puerorum*.

And if it shall be so upon Judgement given in other Court, why shall it not be so here in this case.

By the Statute of 4 H. 4. capite 23. Judgements given in the Kings Courts, shall stand in their force, and not to be avoided, but to be upheld, untill they be overthrowen, by Attaint upon verdict, or by a Writ of error, and not otherwise.

And so is the Common Law also, as the same appears by 18 E. 4. fol. 29. a. b. 33 H. 6. fol. 43. 34 H. 6. fol. 24. 37 H. 6. fol. 33. Where it is said, quod Judicia, in curia domini regis, illata, stent in suo robore, & effectu, quousque per errorem, adnihilentur, &c. And this Judgement here given in 1 Maria, was never impeached by any Writ of error, and therefore the same is to stand, and be in its full force. And we are now for to maintain this Judgement, and as touching this, we are to intend, all things conducing therunto, to be lawfully done.

Admit here, that the Quare Impedit was brought after the 6. Moneths. Yet this now is not at all materiall, the Clarke being removed. But this Judgement hath never been impeached, by error, or attaint, the same therefore remains in force, and so shall stand, having never been avoided.

And so this Judgement here remains in force, and therefore we ought here to presume, pro sententia, that this Quare Impedit was brought, within the 6. moneths; and this in maintenance, and upholding of the said Judgement. And if the same was brought after the 6. Moneths, yet because the Judgement hath not been impeached, by error, or attaint, the same therefore still stands and remains in suo pleno robore. And these are onely the two legall wayes to impugne this Judgement; either by error or attaint.

As to the last matter, being, The Parson of the Church, hath the advowson of this in fee; by his last will, he wills, that his Executors, two, thre, or any one of them, do present such a one, when the Church shall become void, and dies, and the Church becomes not void, till by his death.

That this may be devised, appears by 37 H. 6. a man may devise a Reversion, as well, as to passe this by Wad; so here it shall be so, of this devise, De proxima presentatione, when this is granted, at this instant, that the grant should take effect, (S.) by the death of the deviser, at this very instant, (S.) by his death, the Church becomes void; yet this shall be a good devise. For notwithstanding the Testament hath



hath no effect, but by the death, yet it hath an Inception in his life time, and this shall make it good.

In 48 E. 3. A man having Lands in London, deviseth this, and after dies with-<sup>48 E. 3.</sup> out heirs, which shall now take effect, (S.) the Will, or the Escheate. It is there held, that the Will shall stand, for that the Escheate merely doth commence by the death, but the Will shall relate to the inception of it, and so shall prevent the Escheat.<sup>31 H. 8. Dyer. fol. 45.</sup> A Lease is made upon condition, that the Lessee shall not alien to any one, during his life, without the assent of the Lessor, he deviseth this, without his assent, whether this was a breach of the condition. It could not be an alienation, but in respect of the Inception of it. So in this Case here notwithstanding they presented VWilliam Tabor, who, with the 2. others, was made his Executors, and the Church coming void by his Death; yet they had good right to present him. It is said, that Tabor came, and refused the Executorship. But it is not said, before whom this was; this ought to have been shewed. 9 E. 4. fol. 33. & 47. the<sup>9 E. 4. fol. 33 & 47.</sup> Bishop of Canterbury was made an Executor, and refused, he was compelled to shew that he refused before himself. But if he had not refused here, yet they might have presented him; and this is the difference between Heckars Case, 13 H. 8. and 21 E. 4. fol. 66. they cannot present the head, but one of the members they may present; and here notwithstanding, that Tabor cannot present himself, yet the other two may well present him. And so upon the whole matter, the Judgement given in the C. B. was well given, and no error in it; and the same ought to be affirmed.

Croke Justice. The Judgement here ought to be affirmed.

The matter in question is for the Church of Bradwell, which seems to be a very unfortunate Church: for quod malo principio inchoatur, raro finitur bono exitu: five Usurpations have been alledged to be in this Case; and the foundation of this Title for Doctor Harris, is a usurpation by Queen Mary first had, who usurpando did present VWood: Afterwards, four usurpations alledged by the Presentation of Mason, Debauk, Tabor and Genge, so that the Bar by Doctor Harris, is intricated with five several Usurpations: But debile fundamentum, fallit opus: And the Presentation, under which he doth deduce his Title, is of all the others the weakest: for the Presentation of Queen Mary, is wholly avoided by the Quare Impedit, in which the matter being generally put, the point here considerable is, Whether it shall be intended that this Quare Impedit was brought within, or after the six Moneths; if within the six Moneths, then the Presentation by this is avoided, but if after the six Moneths, then not.

As to this, it is to be observed for a Maxim, (S.) Quae in Curia regis acta sunt, rite agi presumuntur: (if the contrary be not expressly shewed.) And when a Judicial act is done in the Kings Court, always in such a Case, presumetur pro sententia.

In the Arpal in the Quare Impedit, the Bishop pleaded nothing, and the Clerk had nothing to plead, it therefore passed against him by a Non sum Informatus: est probabilis & violenta praesumptio, that this Quare Impedit was brought within the six Moneths, because the Judgement of the Court was subsequent unto this: And this Judgement so judicially given, ought not thus to be blotted away by a bare and an uncertain surmise, but the same is to stand and remain in force, until it be legally avoided by error or attainr, as appears by the Statute of 4 H. 4. cap. 23. Ju-<sup>Statute of</sup> dicia in Curia regis reddita, Non debent reversari, nisi per errorem, vel Attineta: 4 H. 4. c. 23. And so the Usurpation by this is clearly avoided, and so a good title for Sir Edward Pincheon.

Then as to the devise, this is clearly good: If a Patron in fee, doth devise that his Executors shall present such a one to the Church, when the same becomes void; although he cannot grant proximam advocacionem, fallen in his life, yet by

debile this is good; the Executoz represents the person of the Testatoz: And so the Judgement was well given, and ought to be here affirmed.

4. Coke chief Justice. When I was the Queens Attornee, she said unto me, I understand that my Counsel will strongly urge, Prærogativa Regina, but my will is, that they stand, pro domina veritate, rather then pro domina Regina, unless that domina Regina hath veritatem on her side: And she also used to give this in charge many times, when any one was called to any Office by her, that they should ever stand pro veritate, rather then pro Regina.

In the argument of this Case, I agree in opinion with those which have argued, and will confirm their reasons.

These Erroz has been very probably taken, but in this Case there appears no title for the King.

The great doubt is, if the recovery in the Quare Impedit be not just, then there is a title in the Crown; and if so, then scribatur Episcopo, as it doth appear by all the Books: But here no title appears: I shall in my argument speak unto these particulars, and will therein shew;

1. First, That it shall be here intended upon this whole Record, that the Quare Impedit was brought within the six Moneths.

2. Secondly, If the same had not been brought within the six Moneths, yet the title of the Earl of Pembroke is by this well rebeited, having a Judgement and a Presentment; by this the same is rebeited, and the right of the Queen gained by the Usurpation, shall be altogether taken away and defeated.

3. Thirdly, As touching the devise, and what is sought by it.

1. As to the first Point: For four Causes it ought here to be intended, that the Quare Impedit was brought within the six Moneths, and this is a plain Case: But to adde reason to that which hath been said, this is but an Inducement to a Travers, and is not the main point; yet it ought to be so pleaded, as that it might probably appear to the Court, that it was brought within the six Moneths.

I will argue this by admittance, if it shall be so intended: The Record it self proves this plainly unto me, virtute cujus, &c. ab Ecclesia prædicta, prædictus Wood, debito modo amotus fuit; and this cannot be so, unless the Quare Impedit was brought within the six Moneths, and this is expressly so averred, that he was debito modo amotus, and therefore &c. and the Earl was seized of the Abbotsdon, and this is a common ground.

21 E. 3. f. 43. Baron and Feme, do release all the right which they had in certain Lands, which dead was inrolled; the Wife brings a Writ of Erroz, and assigns for Erroz, because the Court Inrolled this Dead, by the Consuance of one who was a feme Covert at the time: Thurning there demands Judgement of the Writ, the same being, that the Dead was Inrolled by the Husband and Wife, ad damnum ipsius Helenæ, and hath not supposed the death of the Husband: To this it was answered, that the Writ saith, that the Dead was Inrolled, ad damnum ipsius Helenæ, which thing could not be intended, if the Husband was not dead, (and if he was living, the other ought to shew this:.) This is a good Case, to prove the Case in the C. P. of Nuper Episcopo.

So here in this Case, when the Record saith, That debito modo amotus, it ought to be intended that this was lawfully brought within the six Moneths, and as for Doctor Harris, if he had dealt Clerke, he ought to have shewed that the Quare Impedit was brought after the six Moneths.

Obj. It hath been objected, Whether the Incumbent be amotus, by the Judgement it self, before any Writ to the Bishop, or a Presentation had by him which recovered, if by Law he be not removed, any other Allegation against Law shall not make an Intendment.

Resp. As to this, and in answer thereunto, by the very Judgement in the Quare Impedit, the Incumbent is removed, and the Patronage is by this regained,

ed, and this so appears by L. 5 E. 4. f. 115. that without any Presentation, by the Recovery, the disturbance is gone and avoided, and the Incumbent by this recovery is removed; and with this agrees 17 E. 3. f. 59. *Smalls Case*, being the best Case in the Law for this, that the Church to be void, before he is to present: There is an avoidance in fact, and in Law, not to present to an avoidance in Law, without an avoidance in fact, And this is for a Rule, if he be not to present when the Church is void in fact, no Writ shall issue to the Bishop. 17 E. 3. f. 59. *Smalls case.*

46 E. 3. f. 13. *John Marshalls Case*, that the Plaintiff who recovered, may present after Judgement, without any Writ to the Bishop; so that this is a plain case, that the Church is void before any Writ to the Bishop. 46 E. 3. f. 13. *Marshalls case.*

Hillar. 37 Eliz. C. B. Rot. 620. A famous Case between Brown and Tirrey: Hill. 37 Eliz. It was found by Office, that such a one dyed without Heir, seised of certain Lands held of the Queen (but there was a right Heir) the Queen had the possession by usurpation. C. B. Rot. 620. &c.

By the Statute made in time of King E. 6. the right Heir shall Traversers a Writ of Feoffment made in fee, and a Letter of Attorney to make Libery; afterwards Judgement was given, quod manus dominæ Regina amoveantur, afterwards the Attorney made Libery.

The first question was, Whether by this the right of the Queen be avoided, without any Writ to the Escheator; the Queen had no title but by a false Office, the Libery was adjudged to be good, because the same was after the Judgement, and before any Writ to the Escheator; and it was adjudged, that the possession of the Queen was avoided by the Judgement.

Obj. It was afterwards objected, that at the time of the Charter of Feoffment made, he had no right.

Resp. To this it was answered and resolved, that he had good right, for that afterwards it shall be adjudged a good Feoffment, upon the Judgement, Quod manus domini amoveantur: So here in our Case the Judgement here given in the Quare Impedit, shall restore all.

It appears by the Register, fol. 17. and 61. In the Writ he may say, ad Ecclesiam Register, f. 17. 61. jam vacantem.

21 Eliz. Dyer, f. 364. *Gerrard Onslow's Case*, the Queen did sell a Benefice, there a Quare Impedit was brought against the Queen, the Ordinary, and the Incumbent, and pendente lite, the Queen upon a Resignation presents another, who is instituted and inducted, and is in by six Moneths; he is removable by a Writ to the Bishop, although he be no party to the Judgement, in the Quare Impedit, there all the Counsel of the Queen were deceived, who held the contrary: For that by the very Judgement all are to be removed; and according unto this, I have known it to be so adjudged again.

2. A second reason, that it shall be intended that this Quare Impedit was brought within the six Moneths, Quia semper presumitur, jus, & veritas in judiciis, Plowden, Judicium, est juris dictum, and none shall alledge any thing against a Record, which is Teste meipso.

3. Thirdly, here is Cohærentia actus, 8 E. 3. f. 386. old Print, and f. 18. new: 8 E. 3. f. 386. *The Arch-Deacon of Woodhouses Case*, in an Assise of d'arrain Presentment, Collusion to be enquired, they enquire of the right, a notable Case it is, there to see how the Judges inclined unto the Possession, and to pass with the same; and Herle there saith, If the Possession be so, I will presume the right to be accordingly, here are five Presentations with the Earl of Pembroke.

The reason of the Case in 8 E. 3. is, because the Statute of 7 E. 1. ordains, Statute of That if any Church-man get any Term, arte vel ingenio, this shall be Forfeiture. 7 E. 1. De Religiosis.

See the Statute of Westminster the second, upon a Recovery not to intend Cobin Westminster. 2. or Collusion; as touching this, vide.



49 E. 3. f. 29.  
&c.

49 E. 3. f. 29. 47 E. 3. f. 13. and Westmin. 2. cap. 3. In another Case, upon a Recovery had against Husband and Wife, durum videbatur: A Recovery shall be always intended to be true, quia Judicium, est juris dictum.

4. A fourth and last reason is this, That Doctor Harris had Connusance of this; for you have divers Protestations, that the Earl had no Title, but there is no Protestation of this, that the Quare Impedit was not brought within the six Moneths, but that this passed by a Nient desire, he confessed this.

1 Octobris, Queen Mary was Crowned, the Depzibation to be after the Coronation.

Obj. It hath ben objected, That he might be depzibed in April, or in August.

Resp. But in answer to this, it cannot be so, for this was after she came to the Crown: VWood did well in this Case, for he having no title, suffered it to pass against him, by a Non sum informatus: But Doctor Harris hath not done so, but the contrary, as thus to prosecute this matter, without any title at all; and he having notice that he was amoved, and so was debito modo amotus; this was not well done by him, for Church-men ought not thus for to bouslier out such bad Causes.

The second Point, be the Recovery in the Quare Impedit, within, or after the six Moneths, yet the Abbotsion is by this revesed, and the Usurpation avoided, by the Recovery in the Quare Impedit, and a Presentment afterwards: For if I purchase an Abbotsion, and before any Presentation had by me, another usurps upon me, and presents, and I bring my Quare Impedit after the six Moneths, and for the Incumbent, a Plea is of Non sum informatus; by this the Abbotsion is revesed, est vere dictum, and it doth reves this, for here was but a remediless right, and if you will not take advantage of it, I shall by this have my right again: I have a right, and having a Judgement to recover this, to the which I have a right, my right by this shall be recovered.

There are Judicial Patents which shall reves one in his ancient right, and if the Kings Patent shall doe this, a multo fortiori, a Judgement shall do it.

2 H. 7. f. 17. If the King usurps upon one, and afterwards by his Letters Patents Grants this unto him again, this judicial Patent, rectifying his ancient right, shall reves this in him, and he shall be in again in his ancient right; the King there usurped by Presentation, to the Abbotsion of a House of Religion, and afterwards rectifying the ancient right of the Abbat, Grants this Abbotsion again to him, and to his Successors for ever; the Abbat by this Grant is again in his ancient right, as it is there adjudged.

21 E. 4. f. 49.  
32 E. 3.

21 E. 4. fol. 49. Hussy there saith, that in 32 E. 3. it was adjudged, that where the King rehearsed, that whereas he had recovered an Abbotsion by default, in a Quare Impedit against a Stranger, which Abbotsion was lawfully appropriated to the Abbat, long time before this recovery; after the King, by his Letters Patents rectifying the recovery, Grants the Abbotsion to the Abbat, and to his Successors, there adjudged, that the Abbat should not be in by the King, but by his ancient right in his Remitter, (which Book I have, but I cannot finde this Case there) here in this Case he hath a Judgement to recover the Patronage, and shall be be Patron, and the Crown also, this cannot be; for this Patronage cannot be in two, and therefore the tortious Title which was in the Queen, shall banish, and the sole right shall be and remain in him who recovered the same.

21 Affisar.  
placito 19.

21 Affisar. placito 19. Tenant in Tail hath issue two Daughters, makes a Feoffment in Fee; they cannot enter, one of them enters, claiming for both of them, this is not good; but if an Affise be brought, and a Recovery in this, she shall be by this revesed unto her first right, and her sister shall enter with her.

4 E. 3. f. 19. by VVilby, If Tenant in tail be disturbed, and where he ought to have a Quare Impedit, he brings a Writ de droit d'avowson, and in this recovery,

bers, or shall be in by force of the title, and not in fa-simple; notwithstanding that the gift of the action be so. For where a Judgement, and my right do meet together, I shall be in, in my right.

25 E. 3. f. 48. Sir John Darcyes case, put in Plowdens Commentaries, fol. 553. 25 E. 3. f. 48. in VValkinghams Case, where, upon the default of tenant for life, the King in reversion prays to be received, by his Attorney, and Serjeants to defend his right; and sent to the Judges, to the same intent, and he could not be received, for if he should be received, the demandant should count against the King, as against a tenant, and so he cannot do, but is put to his petition, he is not to impleade him, as tenant, in no case, neither shall count against him; and so though the King was not received there, yet no prejudice shall come to the King; for if the title of the demandant be feint, he shall not gain the reversion against the King by such a Recovery: but if it be good by a Recovery against tenant for life, this shall disest the fa-simple out of the King, who is in reversion, or remainder; so if the King have a title, no recovery shall shake this.

4 E. 3. fol. 19. When the Crown hath a title by wrong, if I bring an Action against one, when I recover, and the Judgement and my right do meet together, I shall be re-vested in my right, and the title of the Crown shall vanish, as in Brown and Tierres case before remembred.

In Plowdens Commentaries, fol. 489. a. in Nicholls Case. If tenant in title discontinue in fee, and the discontinuance enfeoffe the King, by deed inrolled, the King leaseeth the Land to tenant in tail, for life, the remainder to his issue for life; the first tenant for life dies, the issue is now remitted, by this remainder, and the fa-simple devised, out of the King, into the donoz, and this without any contrivance de droit, or any other circumstance.

So that allwayes, when right and wrong do meet together, the right shall ever be preferred.

Now as to Judgements given, these are sacred things, and this appears by these Statutes following. (S.)

Magna Charta, capite 29. 5 E. 3. c. pite 9. 14 E. 3. capite 5. 25 E. 3. capite 4. 28 E. 3. capite 3. 27 E. 3. 41 E. 3. Westminster the 2. 4 H. 4. capite 23. That after Judgements given, in the Kings Courts, the parties and their heirs, shall be of this in peace, untill the same be reversed, by Error or Attaint, if error be in the same, be it in personal, or in real actions.

In the next place, As touching the devise here.

Debanke, being Parson and Patron of the Church, and devised the next presentation to Thomas Debanke, Taber, and Cox, &c.

It hath been objected, that this is a flower fallen, and so not to be Granted after his death, for that the Church becomes void by his death, when the devise is to take effect.

In answer to this, which is a high point in a low house. The devise hath its inception before, (S.) in his life. 38 H. 8. Dyer, fol. 45. before remembred, in case of a devise, overrules this case. 4 H. 4. fol. 17. a remainder is to vest, during the particular estate, and good, there was the Original Act, a remainder to the right heirs of cestui que vie hereditamenta tenui pendente filo, Inheritances, the saying of St. Augustine. Sicut audio sic judico, & judicium rectum meum. Non sicut odio nec sicut amo, sed sicut audio, So to judge. And so I will conclude this case, with the saying of Queen Eliz. before remembred, to stand pro domina veritate, Non pro domina Regina; and that the Judgement given in the C.B. was well given, and so the same ought here to be affirmed; Et Sic Scribatur Episcopo, &c. being the consequent of this.

Dodderidge Justice. If I plead a Recovery by default, whether ought a title to be averred?

24 H. 8. Brookes Cases, fol. 13. placito 64. Brooke, title pleadings, placito 6. Datum fuit pro lege, that he which pleads a recovery by default, ought to averre his 64, &c.

his title of his *Writ*, and also, that the Defendant in the *Recovery* was tenant of the *Freehold*, *die brevis*, but where the *Recovery* was by *Action* tried, he need not to take the one *aberrment* or the other. If one *Recover* against another, by a *Nihil dicit*, he ought not to *aberre* his title.

Coke. He ought not here in this *Case*, to *aberre* his title, because the same appears, where I plead a *Recovery*, against the party himself, I need not to *aberre* the title against him, nor to *aberre* his title.

Doddridge. The difference will be this, where the title appears of it self, there no *aberrment* needs to be; but where this doth not appear, there an *aberrment* ought to be.

Doctor Harris, moved the Court, for stay of Execution, till Mich. Term next.

Curia. We will not make you any longer to be of this male fidei possessor, and so to burden your Conscience any more with this, and you will be much better without it; we cannot in this satisfy your demand.

Co. e. One was never as yet deprived under three moneths, and then the *Quare Impedire* was brought within the 6. moneths. It is better for you to be in the University, then to be here prosecuting of such suits. For *Clericus in oppido, tanquam piscis in arido*. And so the Rule of the Court was, *Quod affirmetur Judicium*; and a *Writ* to the Bishop, granted for the Defendant.

Judgement affirmed.

### Selly Plaintiff, against Facy Defendant.

Action upon the Case for words, loss of Marriage.

It is an Action upon the Case for words. The Plaintiff lays in his Declaration, that there was a speech of *Marriage* between him and one Susan Warts, and likewise to take effect. To which Susan the Defendant did utter these words of the Plaintiff, (S.) *My Wife is a Whore*, and I will prove it, for she was nought with Will. Selly, the Plaintiff, and if I had had a Candle, I had taken them together doing the deed; and that by reason of these words, he lost his *Marriage*; a verdict for the Plaintiff, and damages moved in Arrest, that the words not actionable, being spoken of a man.

Coke chief Justice. Justice Clenches Grandchilde was to marry with such a man, to whom one said, of her, that she had had two Bastards, one by one Warts, and another by, &c. By which words she lost her Husband; she brought her Action, and recovered 200 Marks, and it is all one, if the words be spoken of a man, as of a woman, laying a speech of *Marriage*, and the loss of his Wife, it being all one, in the same degree and equipage to lose a Husband, or to lose a Wife, and so by the Rule of the Court, Judgement was given for the Plaintiff.

Judgement for the Plaintiff.

### John Burrowes, Will. Cox, Dyton, and other Plaintiffs, against the High-Commission Court.

A Habeas Corpus to the High Commission Court.

Mo. 840.  
Cro. Ja. 388.  
1 Ro. Rep. 337.  
Hob. 84.  
3 Inst. 333.

They being committed by the High-Commission Court, upon motion, a *Habeas Corpus* was granted for them; upon which they were brought into Court, and the Return was read, expressing the cause of their Commitment.

Finch Serjeant. The return is bad, both for the manner and matter of it. The Warrant for their commitment, was to detain them there in prison, until the High Commission Court should take Order for their delivery: This is not good, the same ought to have been, until they should be delivered by order and course of Law.

The



The Return is likewise bad for the matter of it, the Commitment being for their refusal to take an Oath; this was no cause for their commitment of them, being to answer upon Oath unto certain Interrogatories to them ministered, in matters touching penal Laws, whereas they ought not to be compelled to answer upon Oath, and so thereby to accuse themselves; and for this their refusal so to doe, they were by them committed.

In 36 Eliz. B. R. in one Mansfields Case, before Popham Chief Justice, this difference was then taken by him: As to answering there to their Interrogatories, between Ministers and Lay persons.

And as touching this, there is in the Register, fol. 36. b. an express prohibition *Ne laici, ad citationem Episcopi, convenient ad recognitionem faciendam*, and there is the Writ accordingly, (S.) *Rex vicecomiti, &c. precipimus tibi, quod non permittas, quod aliqui laici, ad citationem talis Episcopi, aliquo loco convenient, de cetero ad aliquas recognitiones faciendum, vel sacramentum præstandum, nisi in casibus matrimonialibus, & testamentariis, &c.* But this did not run to Ministers.

Also they ought not there to press any one to take an Oath, by which he should subject himself to the danger of a penal Law, or of Felony, this they are not to doe.

As to this purpose is 1 and 2 Eliz. Dyer, fol. 175. plaito 25. Scrogs Case, who refused to answer unto Commissioners appointed for the determining of the Office of the Exigenter of London, between him and one Colleshill, a Patente of Queen Mary, upon the death of Brook chief Justice of the C. B. tempore vacationis, and therefore he was committed; and Hindes Case there cited to be, Termin. Mich. 18 Eliz. agreeing with Scrogs Case, who refused jurare coram Justiciariis Ecclesiasticis, super articulos pro usura: The reason why in such Cases a man needs not to answer, is, because that no man ought to accuse himself.

And in 1 Eliz. in the C. B. one Leigh's Case, who was committed by them, for refusing to answer to certain Articles read unto him, concerning the hearing of Wals, and was therefore by them committed, but delibered upon this reason, That if he should answer, he might by this subject himself unto a penal Law, which he ought not to doe.

Also in the return, there are these general words, (S.) (and other things) which are not expressed, and this may contain matter of Felony; and so in verity it was, for one of the Articles ministered was, Whether he had stolen a Surplice out of the Church, or not; he having been accused for this, and therefore not bound to answer thereunto.

Coke chief Justice. This is a point of very great consequence, to examine and to see in what Cases the Ecclesiastical Judges may examine one upon Oath, and in what not.

A Minister, who is *infra sacros ordines*: It is clear, that they may examine such a one upon Oath.

It is also clear, that by the Statute of 2 H. 4. cap. 15. and untill the Statute of 25 H. 8. cap. 14. which repealed the same; Lay-men also were by them to be examined upon Oath, but not afterwards, (unless it were in these two Causes, (S.) Matrimonial, being secret, and testamentary.

In these, Lay-men to be by them examined upon Oath.

And as to this which hath been said, it is evident and clear, That if they exhibit Articles to one, which concerns a penal Law, they ought not in such Cases to examine them upon Oath, notwithstanding they have Jurisdiction of the Cause, for that they shall not make one thereby to subject himself to the danger of a penal Law.

As to Leighs Case remembred, this was mis-recited, for it was 10 Eliz. Dyer, Leighs Case, but not in the printed Book; but in his other Book, a Manuscript written with his  

P

his

his own hand, which Book I have, in which there are many Cases, not in the Printed Book; and this Case was then in the Court of the C. B. when the same did flourish; this Leigh was an Attorney of the C. B. (he loved Pass as well as he loved his life) thither he went, and would go to hear this: And as touching this matter, the Ecclesiastical Judges would have examined him upon Oath, he refused to answer them; upon this, they committed him to the Fleet: The Judges did then presently send for their Attorney by a Habeas Corpus, and upon the return they did in this Case examine the matter, and said, *Quod nemo tenetur seipsum prodere*, and so for this cause they then delivered him, (the Parator would be always ready to take one by the back for the penalty, if he once confess the matter against himself.)

18 Eliz.  
Hindes Case.

In 18 Eliz. Hyndes Case before remembred, resolved, (Some love money, and he loved Usury well) the Parator there presently had him by the heel, they would there have examined him touching this matter, upon Oath, to have had him to swear, Whether he had taken by the year more then 10 l. for the loan of 100 l. to doe this he refused, therefore they committed him to Prison; upon this he had his Habeas Corpus, and was discharged by the Judgement of the Court, upon the former reason.

Also there were two other Cases there in the time of my Lord Dyer, of the same nature, and upon the same reason, were discharged upon their Habeas Corpus: *Quia nemo tenetur seipsum prodere*, and so by his own confession, to subject himself unto an Informers suit.

Here in this principal Case, they were to answer unto these Articles ministred unto them, which concerned the reformation of the Book of Common Prayer, and the altering of it, which would be an offence against the Statute of 1 Eliz. This is a new Case, but yet it is an old and a beaten Case, and hath been before this time argued.

And so a day was given over for the Court to be better advised herein.

This matter was afterwards moved again, and relied upon a *Curia ulterius advisare* vult:

Termin. Mich. 13 Jac. B. R. &c.  
One reason for this was, because the other party desired to have their Counsel heard in this Case, and therefore they, (S.) Dyon, Holt, Burrows and Cox, by the Rule of the Court were remanded to the Prison of the Fleet.

Afterwards, (S.) Termin. Mich. 13 Jac. B. R. This Case was moved again: Concerning the High Commission Court, and their Oath, *ex officio*, to examine upon Oath, a matter concerning the breach of a penal Law, (S.) Upon the Statute of 1 Eliz.

Coke chief Justice. Lee's Case was, as it hath been remembred, who was at Pass in the Spanish Ambassadors House, they would there have examined him upon Oath, as touching this, but he refused; and so was Hindes Case for Usury: In such Cases they are not there to examine upon Oath.

As to examine Patrons, touching corrupt Contracts, for that *Nemo tenetur seipsum prodere*.

Here the Civilians are to shew cause why they proceed there in this manner.

And as touching this matter, I will confer with them of the High Commission Court, and I will shew unto them what hath been done in like Cases in former times; and I will further shew unto them the Books: For it is very clear, they cannot proceed so, and so I will satisfy them herein for the time to come.

And all this I will doe for the future ease of the Subiect, and so to prevent motions in the like Cases.

And this I will doe, (not that we are afraid here to doe Justice) for this notwithstanding we will doe, but this I will doe for their future directions.

The

The Court directed to have the Articles brought into Court, and to be here read, and for this a further time was given.

Afterwards this matter was moved again.

Coke Chief Justice. This is a Case of great consequence. In the time of King H. 5. fault was then found, and a great complaint made in Parliament, that they in the Ecclesiastical Court would not deliver unto the parties copies of the Libels against them, for these directions have to make their Answers, or to be in what cases they might have a Prohibition: Upon this complaint, and for redressing of the same, was the Statute made of 1 H. 5. cap. 3. by which it was Enacted, that they should have the Copy of the Libel delivered to them; by which they might either give an answer, or procure a Prohibition; and it hath been adjudged in the C. B. that this Statute was but an affirmation of the Common Law: And so for them there to do against this, is to do against the Law; so that such denying of the Copy of the Libel by them, is against the Law of the Land, and also to the great damage of the party.

Here in this Case the High Commission Court do not proceed by way of Libel, but by certain Articles, being in the nature of a Libel; Whether they are not to deliver a copy of these to the party, by this Statute.

If a man be to answer, and takes his Oath to answer, before he knows to what he is to answer.

This Statute extends to all such Courts, who use to examine ex officio; if they proceed there, and do not deliver a copy of the Articles, we will then in such a case grant a Prohibition.

To this purpose, see 4 E. 4. f. 37. Rose Browns Case, upon this Statute of 4 E. 4. f. 37. 2 H. 5. capite 3. That an Action upon the Case lieth upon this Statute, if they refuse to deliver a copy of the Articles, or the party may have a Prohibition. Rose Browns Case.

And so a day was given them, to shew cause why they refused to grant this copy.

At which time the Court was moved again to have them discharged, being committed for refusing to answer the Articles upon Oath, without having a copy of them.

The Statute of 2 H. 4. cap. 15. made for purgishing of the Lollards for Heresie, Stat. of 2 H. and this continued in force till the Statute of 25 H. 8. cap. 14. which repealed the 4. cap. 15. &c. former Statute.

See Fitz. Nat. Brev. fol. 41. who writ after 25 H. 8. recites the said Statute, by Fitz. Nat. Br. which 2 H. 4. is repealed: They are not to cite men to appear before them, nisi in f. 41. causis matrimonialibus & testamentariis, &c.

Also they would here examine them upon Oath, and so expose them within the danger of a penal Law, without the penalty of the Statute of 1 Eliz. for not conforming of themselves to the Book of Common Prayer; they are therefore not to answer upon Oath, according to the former Resolutions in Leighs Case, Hinds Case, and Scrogs Case.

Also a Copy of the Articles was prayed, upon which they were to be examined according to the Statute of 2 H. 5. which was denied them; these Articles being in the nature of a Libel, and so within the extent of the Statute: And so was the Resolution in Rose Browns Case, where they denied a Copy of the Libel, a Prohibition thereupon was granted, and an Attachment for that, this denying a Copy of the Libel is a temporal wrong.

Doctor Martin, the Kings Advocate for the High Commission, did inform the Court, that a cause was shewed unto him between the King and the Commissioners, and Dyton and Holt, the matter against them being for misdemeanors, tending to Schism: these were called to answer, being wicked Schismatics, traducing the King, saying, That his Laws are wicked and impious, speaking against



all Church-Government; this Court hath been in this Cause very much abused: There were eight of them called in question for this, the two here are *minimi Apostolorum*, the other have answered; but these two, *Non relecti, sed electi*, to stand out in this matter, and not to answer to these Articles offered to them; and this tends to the great disgrace of the King, and of his Ecclesiastical Court.

Obj. As to the Objection, That they are not here to answer this upon Oath.

Resp. Crimes of this nature which concerns the State, do require diligent examination, and this by Oath.

Obj. As to the Statute Objected of 2 H. 5. and that this Case here shall be taken to be within the equity of it.

Resp. This is not so, for this Court was not then *suprema Lex, salus populi*, here is no party, and so not like to a Libel; these men are well known to be *Seditiomaticks*, and it is against the policy of the State, to shew unto them the particulars upon which they are to be examined, and for these sixty years this course hath been practised in this Court: One of these, (S.) Burrows, had a Copy of the Articles delivered to him: This Faction doth much abound, and if these are not to be called into the Ecclesiastical Court, they will then grow bold and factious, and spoil all in the end; and if this Court shall not be suffered to question them, this Land will then overflow with blasphemous and wicked persons, and therefore they are to remain in Prison until they do conform themselves.

Coke Chief Justice. Were you have taken upon you three persons, (S.) A Statesman, a Judge, and an Advocate.

As an Advocate I commend you: But for you in your judicial course, to censure a Serjeant at Law, this doth not become you.

And as a States-man: In this also you are much mistaken.

As an Advocate we join with you, if you have certified any thing done against the King: But here you say, that they do keep Conventicles, and do not conform themselves to the Book of Common Prayer.

All this which you have thus said to this purpose, is out of the Book, this not appearing unto us by your return so to be: *Contemporanea expositio* is the best: I have shewed you a Case adjudged, 10 Eliz. Rich. Leigh contented before the Bishop of London, for hearing of Mass in the Spanish Ambassadors House, he was committed by them, because he refused to answer upon Oath to the Articles, and upon his Habeas Corpus was then delivered by the Judges of the C. B. and so was Hinds Case before remembred.

In Brown and Hixons Case, in the time of Anderson Chief justice, committed for Simony, because he refused to answer, and upon his Habeas Corpus was delivered by the Judges of the C. B.

In doing of Justice, we do honor the King, he being the most renowned King in Christendom: If you proceed against one upon a penal Law, in this you are not to examine upon Oath, you are to Fine and Imprison.

No Judges that ever were in former times have done more for the High Commission Court than we have done: And as to that which you have said, that they ought not to have a Copy of the Articles on which they are to be examined; this your Allegation is clearly against the Law, for they ought by the Law to have Copies of the Articles delivered to them.

We will not here encourage any Sectaries; you say that this concerns the King, and here we are *coram ipso Rege*: If this matter, as you say, was done publickly in the Church: This is then notorious, and therefore you need not examine them upon Oath as touching this, when as all the Parish can well inform you of it.

Dodderidge Justice. We do all of us agree with you in the due punishing of these Sectaries; and in this we will rather strengthen than weaken you; and will acquaint them of the High Commission Court with this, before we will do any thing herein.

And

And so this rested with a *Curia ulterius considerare vallet*.

Afterwards (S) Termin. Hillar. 13 Jac. B. R. the Court was moved again, for the discharge of these Prisoners committed by the High Commission Court, and now brought in by Habeas Corpus. Term. Hillar.  
13 Jac. B. R.  
this matter  
moved again.

Coke Chief Justice. As to these persons thus committed by the High Commission Court, they have now been in Prison three quarters of a year; an Oath was there offered them to be sworn, which to do they refused, and desired a Copy of the Articles against them from the Register, which was denied them; for their refusal to answer upon this Oath, *ex Officio*; they were therefore committed.

We are now to give our judgments here upon the return now before us; being that they refused to receive the Oath according to the Book of Common Prayer; and for their not answering to the Articles they were committed.

I will not by any ways maintain Sectaries. But the Subject ought to have Justice from us in a Court of Justice. For three causes, my Conscience and Judgment do lead me in this Case, that this return here is not good.

First, the Statute of 1 Eliz. is a penal Law, and so they are not to examine one upon Oath upon this Law; thereby to make him to accuse himself; and this was Leighs Case, 10 Eliz. before remembered, *noluit jurare*, therefore he was committed, and delibered by the Judges of the C. B. upon his Habeas Corpus; and so was Hindes Case, 18 Eliz.

A second cause which doth satisfy my Conscience, when they demanded the Articles, they ought to have had of them a Copy. The saying of Bracton doth satisfy me, being this, (S) *Jura Ecclesiastica limitata, infra limites separatas*. If they do exceed them, then a Prohibition is to be granted.

Also to prove this, that they ought to have a Copy of the Articles. By the Statute of 2 H. 5. capite 3. the Ecclesiastical Judge ought to deliver to the party a Copy of the Libel; and this to be so, for his better direction what to answer. Two reasons there are for their delivery of Copies of the Libel. Stat. of 2 H.  
5. capite 3.

1. First, that by this, they may know, whether the matter, for which they are questioned, be within their Jurisdiction, or not.

Secondly, that by this they may know what answer they are to make to the matters against them.

And for these two reasons they ought to have a Copy delivered to them. The denial of which is against the Law. And this Law of 2 H. 5. is not *introdactivum novæ legi*, but *Declarativum juris antiqui*. They have there but a circumscribed and a limited power, which they are not to exceed.

A third reason may be drawn from the liberty of the Subject, the which is very great as to the imprisonment of his body, and therefore before commitment, the party ought to be called to make his answer, and if he be committed, yet this ought not to be perpetually; if one shall have remedy here for his land and goods, *a multo fortiori*, he shall have remedy here for his body, for delivery of him out of Prison; being there detained without any just cause. I do much dislike of these Sectaries: In Leighs Case, there it was in case of Idolatry, being committed for hearing of Masse, and delivered by the Court of C. B. because he was not lawfully committed; not to be taken *pro confesso*, his not answering, but we here will not deliver them, as there the Judges did in 10 Eliz. Dyer. But we will here bail them; and they in the interim to make their application unto the Commissioners in the High Commission Court, and there to submit themselves to them.

Croke Justice. We in this case here have proceeded *Lento pede*, we have agreed to bail them (*Cursus Curia est Lex Curia*.) This to the Objection made, that they are to examine upon Oath, as in the Star Chamber.

Coke. This is *Inventio Diaboli*, ad *detrudendas animas hominum*, ad *Diabolum*.

*Curia.*

Curis. We are all of us agreed here to bail them; but withal we advise them in the interim to go and conform themselves.

Coke. Non expetentia; sed reverentia, as to the receiving of the Communion kneeling.

Dodderidge Justice. If they think they may examine them upon Oath, and not to deliver them a Copy of the Articles, yet shall they still be suffered to lie in prison perpetually; we will not suffer this so to be, but we will bail them until the next Term, and in the mean time to conform themselves.

Coke. In their proceedings here, there is no conviction, neither are they convinced by proofs made.

Coke & Dodderidge. We will not here do as the Judges in like cases did in Dyers time, there they did discharge them absolutely; but we here will now only bail them, to appear here again the next Term; and so accordingly, by the rule of the Court, Bail was taken for them.

Term. Trin.  
14 Jac. B. R.  
this matter  
moved again.

Afterwards, (S) Termin. Trin. 14 Jac. B. R. This matter was moved again, and Harvey Serjeant took exceptions to the Return.

Coke. As to this matter, before the return read, This is a return of another Term, and there may be other new matter happened in all this time. And therefore this is to be observed for a Rule, and always it hath been so used in such a case to have a new Habeas corpus, as of this Term, before the Return be read.

And so accordingly upon the Serjeants prayer, a new Habeas corpus was granted by the Court, and a day given for the Reading of the Return; on which day Harvey Serjeant took exceptions to the Return, the same being, Quod Committimus sui per Commissionarios pro causis Ecclesiasticis. The cause that being asked openly in the Court, whether they would conform themselves according to the Law of the Church, or not? They to this answered, that they came thither to satisfy the Judges: de B. R. and if they offended afterwards in this, they would submit themselves, but made no other answer, to the question so then propounded, either by way of affirming or disaffirming the same, and because they would make no other answer to the question, for this cause they were by them committed again.

The Court upon this gave them a further time to make their return; so as they would stand unto it.

The Court was then moved to have Holt committed to the Prison of the Marshalsey, being indebted to another for a just and due debt.

Coke. If it be for a due debt, the Law is clearly so; that he is then to be committed to the Prison of the Marshalsey; and this appearing to be so, he was accordingly by the Rule of the Court committed to the Marshall.

Afterwards Harvey Serjeant took two exceptions to the return, 1. The commitment being in this manner, (S) Take into your custody the bodies of such persons, and them keep until we shall take further order for their delivery, this is not justifiable, for the same ought to have been, until they should be delivered by due course of Law.

2. Because there was no Bill against the parties.

Coke. Take the whole case touching matters of commitment; many times the parties are committed donec, the business discuss fuerit; This here is an ill case, it concerns the Law of God, (the cause) for that they did not kneel, and this is of a dangerous consequence, their Bail is not discharged by that which we have done before, we commanded you to attend the Archbishop, but did not discharge you. As to this manner of proceeding, I do doubt of it, but no new Libel is to be.

Dodderidge Justice. Whether there was a Libel or not, it belongs not unto us to determine this; they are there to deal with Heresies and Schismes by the Statute; and this is a Schism, this is also the manner of their proceedings, and we are not



not to take notice, whether they proceed there, in this case by libell, or not; but we do know this, that the matter, for which they were committed, is a Schisme.

Curia, Did all accord in this; and advised them to submit themselves, and not to be (as they have been, worse then before) when they came there before them, to submit themselves; and therefore, untill their submission, they are to remain in Prison. The reason, upon the first return of our Opinions, for their delivery, was, because they were committed, upon the Statute of 1 Eliz. for refusing to answer upon Oath, being the Oath ex Officio; and for this cause, they were not to be imprisoned; and so this unlawfully done by them; but it is not so here now, this being for heresse, the which is herere, & pertinaciter herere, and they have as good power and authority, to commit for such causes, as any Court hath; and the cause for which they are here by them imprisoned, is for a great schism, and this doth properly belong to them; so that their imprisonment here is lawfull; and they ought there to submit themselves. And so by the Rule of the Court, they were remanded back again to the High Commission Court, without any Baile taken for them. Remanded per Curiam, without bail

### Golde Plaintiff, against Death Defendant.

Entred Termin. Hillar. 12 Jac. B. R.

Rott. 241.

**I**n an Action of Debt, upon a Bond of 300 l. being the Bond of an Apprentice; Debt upon a Bond. Conditioned in this manner, (S.) That if he did waste his Masters Goods, and that this should be proved, by his Confession under his hand in writing, or otherwise, and if within three moneths after, satisfaction was not made unto him, then the Bond to stand, and be in its full force, it is set forth, that this was so proved, and that he had made no satisfaction to him, unde actio accrevit. Mo. 845, 888.  
Hob. 92, 217.  
1 Ro. r. 222.  
261.  
2 Ro. Abr.  
395.  
2 Cr. 381.

The matter in question, and doubt in this Case was, touching this proof; and what kind of proof this ought to be; when and how to be made.

It was urged for the Defendant, that by the condition of the bond, this ought to be proved by the apprentice, under his hand, in writing or otherwise; here it is alleged to be written, but not pleaded to be under his hand and seal; but the same is his own confession, also that this is not to be shewed here in Court, but to the party himself, and as to proofs, what proof the Law intends. See for this—

Coke 4. pars. fol. 74. b. in Palmers case, and Coke 6. pars. fol. 20. in Gregories Case; if it be spoken of proof generally, though there are many kind of proofs in the Law, yet this shall be intended the best proof, and that is by Jury; and so is 10 E. 4. fol. 11. b. and 7 E. 2. Fitz. title Barre placito, 241. and Perkins in his Chapter of Conditions, 154. placito 791. Coke 4. pars.  
fol. 74. b.  
Palmers case,  
Coke 6. pars.  
fol. 20. in  
Gregories case.  
10 E. 4. fol.  
11. Perkins.  
fol. 154. pla-  
cito 791.

For the Plaintiffe, it was urged, with this difference, as touching proof, (S.) where by the condition of a Bond one is to prove a thing, before Justices of the Peace, and where before Justices de L. B. R. where the proof is to be made before a private man, there the proof is not to be by Jury; and here in this Case, the reference is to prove by the Apprentice himself, and no other proof can be.

As to the Objection made, out of the reference of the proof to his own confession; That here two Issues by this are offered, (S.) either, that he did not waste the Goods, or that he did not confess the same; and that this his confession here, is not sufficient, because it is not said to be under his hand and seal. In answer to this; The proof here is good, having reference to the condition, the same being, if proved by his Confession, under his hand, or otherwise, that he had wasted Object.  
Resp.

wasted the Goods; and that if upon notice of this given unto him, he did not pay, and then, &c. and this so shewed accordingly, under his own hand, and yet he hath not paid.

The Court at this time gave no opinion, nor Judgement in this Case, but would be further advised herein, and so the same was by the Court adjourned to a further time to hear Arguments herein.

Termin. Mic.  
13 Jac. B. R.  
this matter  
moved again.

Afterwards (S.) Termin. Mich. 13 Jac. B. R. This Case was moved again, and argued by George Croke, for the Plaintiff, and the onely point insisted upon, was touching this proof, what kind of proof this ought to be, how, and in what manner to be made; that this proof here is properly to be made, in the same Action, and suite brought; but otherwise it is where the reference is especially to another kind of proof, as the Case is in 7 R. 2. Fitz. title Barre placito 241. before remembred, where the proof is referred to no time, nor person, there the proof is to be in the same suite, the Book of 10 E. 4. fol. 11. Alblafters Case, before remembred, the best case in the Law for this, the condition there was, that if he did sufficiently prove the matter, that then, &c. What kind of proof this ought to be, there appeareth. Coke 5 pars. fol. 107, 108. in Sir Henry Constables Case, touching prooffe, where it appeareth what prooffe is allowable by the Law, and what not; and where a prooffe is to be by a Jury of 12 men, and where not. But where prooffe is limited to be within a certain time, as within a moneth, or thre moneths, as this Case is; there the proof ought not to be by Jury, but by testimony of witnesses, 15 E. 4. fol. 25. agrees with the other Books, upon the former difference, and 33 lib. Assisar. placito 1. where the reference is, to prooffe made by certain persons; and Mr. Perkins before remembred, fol. 154. placito 791, 792. having viewed all the Books, agrees upon the former difference, where the proof is generall, there to be by enquest, in the same suite, otherwise where the same is especially referred to times, or to persons certain, before whom proof is to be made.

In this principal case here, the condition is, that if he do waste the Goods, and this proved, by confession, or otherwise, he then to have thre moneths to make satisfaction.

In 32, and 33 Eliz. in the B. R. between Cragge and Griffin, in an action upon the Case for a promise; two were in controverfie upon a wager for running. It was said, that the wager was got by deceit; the other said, give me 1 s. and if you can prove, that this was gotten by me, by deceit, I will give unto you 5 l. for it; upon this he took the shilling, and the other brought his Action upon the Case upon an assumption, for the 5 l. and laid in fact, that he had gained the same wager, by deceit; and adjudged that the proof of this deceit, in the same action brought for the 5 l. is sufficient; and there in this case, Wray chief Justice, took the difference, where the proof was generall, and where with a reference, to time, and to person, where the proof is generall, there the same ought to be by Jury, for this is optima probatio.

And so was the Case, 29 & 30 Eliz. in the C. B. Glemman, and Browns Case, in debt upon a Bond, the Condition was, that if he payed to the obligee so much, within 6. moneths, after his return from Venice, proving this, he proved the same under the hand of the Duke of Venice, this was held to be no sufficient prooffe, but that the same ought to be by Jury. But here this Case doth differ, the condition being, if proved by his confession, or otherwise.

As to the Objection, which hath been made, and that very colourably, that this confession ought to be intended, and a confession in the Action. But this is not to be so, but it is a Confession under his own hand, and this is good, and sufficient, for that every man is estopped, to say any thing against his own confession. And according to the former difference, it was here in this Court so adjudged, in a Case between Holliday and Tedcates, upon an Apprentices bond also. And if the Law should

Object.  
Resp.

Holliday and  
Tedcates case.  
B. R.

should not be so, no remedy would then be had, upon an apprentices bond; and here in this case it is their own agreement, to have it so, & modus, & conventio vincit legem.

Dodderidge Justice. The words of this condition, are, If waite the goods, &c. then, and as often, &c. proved by his Confession, or otherwise howsoever, and this is as generall as the same may be.

Haughton Justice. This reference of the proof is particular in this Case, the same to be, by confession of the party himself, or otherwise, no evasion can there be out of this; if it be not to be a confession, in the Action.

Croke Justice. This is to be observed for a Rule, that if the issue be, whether due proof, or not, in fact, the Law shall then try, and determine this per pais, but where it is upon the validity of the proof, whether the same be good, or not, the Judges they are to try, and determine this.

Dodderidge Justice. The Case remembred, in 33. Lib. Assisar. placito 1. is a notable case, and no difference there is between that Case and this Case now here in question; there it is, if rent be behind, or waite done, and that 8. men to have the view of it, it is there shewed, that the rent was behind, and that 12. men had viewed the waite; and therefore he entred; the condition there was, if proved by 8. there 12. did view, but it did not appear, that they viewed it by Writ; but they under their hands, did testifie, that the land was waisted; and this there adjudged, to be a good proof, the which case over-rules this Case now here in question.

Haughton Justice. Notwithstanding, generally, proof is to be by a Jury; but yet if the Case be particular, there this proof shall be, as it is in 10 E. 4. fol. 11. by Littleton, if to be proved within 3. moneths, this is not to be by Jury, because this cannot be done in so short a time. 7 R. 2. makes not much to this Case, two things are there mentioned to be done, but it comes not there to proof by two witnesses. Here the Case is not put upon a general prooffe, but upon a prooffe by confession of the party himself, and this is to be intended, a personal Confession.

Croke Justice. If one be bound to pay such a sum of money, within 10. dayes after the death of I. S. this proof is not to be by a Jury; so where it is referred to the likes of parties, or to other Circumstances, this not to be tried by Jury; but the Law shall here adjudge, what proof is good.

Dodderidge Justice. As this condition here is, it is altogether to have this proved by Jury (this being, from time to time, and as often, &c. he may make here Sunday Spoiles).

Croke Justice. The matter in this Case that troubles me, is, whether this Confession were gained by restraint, or by any undue means.

Dodderidge Justice, & Curia. We may then as to this well take Issue, that either he did not confess the same, or that he did not waite or imbeil any of the Goods, and then proof ought to be here by verdict; but no such matter there is in this Case; and so the whole Court agreed herein, that here was good proof made according to the condition, and that so the Plaintiffe had just cause of Action; and therefore by the Rule of the Court, Judgement was entred for the Plaintiffe.

Afterwards, Hutton Serjeant, did shew unto the Court, that the Defendant had brought a Writ of Error, upon this Judgement, and so moved the Court, for stay of Execution, this being in the nature of a supersedeas; But in verity, this Writ of Error was brought, and the same returnable, the second return of the next Terme.

Coke chief Justice. By 5 and 6 H. 7. If a Writ of Error hath a long return, 5 & 6 H. 7. then Execution shall be Granted presently. So cause there is here in this Case to have a Writ of Error. But this Writ of Error being returnable the next Term, by this it plainly appears to the Court, the same to be onely for delay, and there.



therefore to be no stay of Execution. But if he had brought his Writ of Error returnable the same Terme, then this should have been a superedeas, as to the execution.

The whole Court agreed herein, that as this Writ of Error is here brought, the same is no superedeas, to the Execution, being onely for delay, and without any just cause; and therefore by the Rule of the Court, execution was Granted to the Plaintiffe, according to his Judgement, notwithstanding the Writ of Error.

### The KING, against Capell.

A Quo warranto.

**I**F a Quo warranto, against Arthur Capell miles, for claiming of a Parket; who pleaded to this, that he claimed the same, by Letters Patents of King E. 3. who Granted this per literas suas patentes, unto the Abbat of Glasbury; But doth not plead, Hic in Curia, Prolat. as he ought to doe.

Sir Francis Bacon the Kings Attornee, did confesse all this to be so. Upon this his Confession, Hutton moved the Court to have Judgement for the Defendant.

Dodderidge Justice. The Patent of King E. 3. he pleads not hic in Curia prolat. The first Abbat dyed, the second Abbat dyed; the third Abbat, named Whiting, under whom, &c.

The Attornee shewed the Statutes of 31 and 32 H. 8. and the Letters Patents made unto William Capell.

Dodderidge. Notwithstanding the Confession of the Attornee Generall. Yet the Judgement is ours; you cannot now plead, after the Confession of the Attornee Generall. But yet, as amicus Curie, you may shew any matter in Law, to us; The Court all agreed herein.

Dodderidge. The Patent is here in Court. But yet this doth not appear so to us judicially; because the same is not here pleaded, Hic in curia Prolat.

Hutton then moved the Court, to have this amended.

Dodderidge & Haughton Justices, moved the Attornee Generall, for his consent herein, otherwise it cannot be amended, and without amendment, Judgement ought in this Case to be given for the King, and against the Patentee.

Afterwards, at another time, this matter was moved again--and--

Coke chief Justice, Moved the other Judges, to have a Rule entered in this Case, to this purpose; That the opinion of the Court was, that the Plea in Barre here is not good, neither in the manner, nor yet in the matter of it; and accordingly, the Rule was so entered, otherwise this matter hereafter, might be evidence against the King; for the preventing of which, this Rule was thus entered, by the Order and direction of the Court.

### Slade Plaintiff, against Tompson Defendant.

Entred Hillar. 9 Jac. B. R.  
Rot. 530.

2 Cro. 374.  
1 Ro. Rep.  
198.  
1 Ro. Abr.  
421.  
451.  
Trespas and  
Ejectment.

**I**F an Action of Trespas and Ejectment for a Passage in Surrey, called the Walnut Tree; upon Non culp. pleaded, the Jury found a special verdict, upon which

which special bequest, the case was briefly this, That Robert Weston was seized in fee of this messuage, and held this of the King, in capite, made his will, and by this devised the same after the death of Alice his wife, the remainder in fee to his son to &c. upon this condition to pay 4 l. yearly unto 4 poor children, to provide so many sermons yearly, and to give them 5 s. apiece, and to give so much annually unto the Prison in Southwark: The first devise died in the life time of the wife, and never came to this; afterwards the wife died, and the heir of the said devise being within age, and so during his minority, in ward to the King; during which time, these payments were not made according to the condition, but at his full age; after his liberty sued, an entry made for supposed breach of the condition, by non-performance of the several payments according to the condition, wherein the sole point moved and insisted upon for the Plaintiff, was this, touching the non-payment of these sums, which were to be paid out of the profits and profits; the same being in the Kings hands for the minority of the Ward; Whether the non-performance of these payments be a breach of the Condition, and so to give cause of Entry, or not, and whether the Petr shall be enforced to perform the condition, during this his minority, and being in Ward, and the profits in the Kings hands, or not.

It was urged for the Plaintiff, that the Petr should be liable to the performance of this condition, notwithstanding his minority, Wardship, and the profits in the Kings hands, for that the condition is created here with the Estate; and that he who is to have the Estate, ought to perform that condition, which always runs with the Land and the Estate in it; and so prove that an Estate of an Infant shall be bound with a Condition, and he to perform the same, and so all conditions in fact, as appears by Stowels Case, in Plowdens Commentaries, f. 355. and Coke 2. p. 115. f. 44. in Whittinghams Case.

Stowels Case;  
&c.

It was further urged, that in these three Cases an Infant shall be bound.

First, In Cases of necessity. 2. In cases of Compulsion. And, 3. In Case of Liberty. 1. For his Diet, and for his necessary Apparel. 2. Where he is to present to a Benefice; if he do it not within his prescribed time of six months, he shall be bound by this his Leases; and so in Perkins, f. 4. plac. 15. Also an Infant shall be liable to a Condition to pay a sum in gross, by 3. 1. Lib. Admarum, plac. 10. 17.

Perkins f. 4.

&c.

31 Lib. Amf.  
plac. 17.

It was urged for the Defendant, that here was no breach of the Condition, by their non-payments, during the time that they was in the Kings hands, by reason of the minority of the Ward, who shall not be prejudiced thereby, by his not paying these sums, during this time, which shall make no breach of the Condition; for if the Land be carried away by operation of Law, the Condition also annexed unto it, shall pass therewith; and this is a good excuse, to say that he could not have the profits, (thereby to satisfy the condition) during the time that the same was in the Kings hands.

Coke chief Justice. This is a very plain and clear Case, that here is no breach of the Condition: It is without any question, that during the life of the Wife, no payment was to be made; and the first here in remainder, died in the life time of the Wife, and his Petr, in Ward to the King, is not now to pay this, the right that is to him, but the profits belong to the King: And by this Condition, the same is as much as if he had said, That he and his Petr shall pay this as long as they enjoyed the profits of the Land; and this is but a description of the person who ought to pay this.

21 E. 3. If Lands be given to the King, and to his Petr, Kings of England, this is a description of the person to have the same (S.) So long as his Petr shall be Kings of England: This is a very plain Case, that at the Common Law these payments are to be made, with the profits of the Land.

20 H. 6. f. 23. If a Lease be made to one for years, reserving a Rent, and the Lessee is bound to pay this Rent: If by reason of a Statute upon this Land, before

before acknowledged, or by another edition for those three years, the profits are taken from him: During this time, he shall not pay the Rent, though he be bound by his Bond to pay it: So here in this Case, the Devisor did so and perceive this, which made him to mention the tenure in capite.

It is man debitor, that I. S. shall yearly pay out of the profits of the Land, so much: At he pleads that he hath not paid this, this is not good, but that he had not paid it out of the profits of the Land, and so he ought to put in certain the Condition, and that he had not paid it out of the Issues and profits of the Land: and so he is bound to do.

Here these payments could not be made, the Issues and profits being in the Kings hands, and so by reason hereof, no breach of the Condition, so here an Entry for the non-payment of these sums, during this time, and no cause of Entry by the Defendant of the Plaintiff for breach of this Condition, and so consequently Judgment ought to be given for the Defendant.

Chief Justice. The charge here is to be supplied with the Issues of the Land, and this is not to be absolute, but sub modo, how? and the difference will be between this Case, and a sum in gross, which is certain.

He had here said, That the remainder man should pay so much, (9.) 101. to such an Hospital, this he should have paid presently, otherwise where it is to be paid with the profits of the Land, the non-payment of these sums here, the Land being in the Kings hands, this shall make no breach of the Condition.

Doddridge Justice. As to this payment, nothing is here left to satisfy this, but that which which rises out of the Land, (S.) The Issues and profits of this, and if this be in the hands of one who is not subject to the Condition, it is then impossible for him to pay the same: And this is not to be resembled unto any other Case so properly, as to the Case of Exaction.

Here the condition is to be suspended, because the party could not perform this by force of Law, he cannot break this condition, as the Case is, this being to be performed with the profits: It is therefore a plain Case here, that this non-payment is no breach of the Condition, the profits being in the Kings hands.

Haughton Justice, agreed herein: This is a Condition, which hath also a Condition in it self, to do and perform this so long as he hath the profits.

The Case of Exaction proves this plainly, as where a lease is made of two acres, with a condition to pay a Rent, one of them covered by an eagle tree, the condition by this is gone: So here in this Case, the Land being in the Kings hands, the non-payment of these sums, according to the condition during this time, is no breach of the condition.

And so by the whole Court, nullo contradicente, here is no breach of the condition, and so no cause of Entry to avoid the Estate, thus devised in this conditional manner; and that Judgment ought therefore to be given for the Defendant, and accordingly the Rule of the Court was, Quod querens Nil capiat per billam.

Now, In an Action upon the Case against baron & feme, for words spoken by the Wife.

Man. secondary, Clench, and the other Clerks of the Court, all said, that in this Case the Husband is not to be found culpable, because nothing is laid to his charge: the verdict here was, that they were not Guilty.

Curia, If a feme sole doe a Trespass, and then takes a Husband, the course in pleading is, that both of them, the Baron and feme, do say, that the Wife is not Guilty.

Chief Justice. In this principal Case for the words, it is as if they should say, That the Client and his Attorney are not Guilty: this is good there, and so here: As to the Husband, the verdict is void, good for the Wife alone, the Husband not Guilty.

The

Judgement  
for the De-  
fendant, &c.



The Rule of the Court was, that this verdict is good, as to the Wife, who did speak the words; but a void verdict as to the Husband, being onely named and joyned for conformity, and not otherwise.

### Haver Plaintiff, against Gibbons Defendant.

**I**n a Writ of Error to reverse a Judgement given in the C. B. the Case appeared to be this; One brought his Bill by his Attorney in the C. B. in which he had Judgement; upon which Judgement a Writ of Error was brought, and the error assigned was, because he had found no Pledges.

Curia, This is a clear Error, and so is 12 Eliz. Dyer, fol. 288. placito 53. where for default of Pledges, the Judgement was reversed.

And so was there a Case, Termin. Mich. 11 Jac. B.R. Vaughan Plaintiff, against Delahay Defendant, in a Writ of Error to reverse a Judgement given in the C. B. in Debt; the Error assigned was, because no Pledges were entered upon the Original Writ in Debt, and for that by 12 Eliz. Dyer, and 9 E. 4. f. 27. every Plaintiff is to be by his Pledges; the reason of this, because he is to be amerced, if Judgement be given against him; and so for this cause it was there held per curiam, that for this omission of Pledges, the Judgement was erronious, and for this cause the same was reversed.

Curia: In the principal Case here, Pledges may be entered when the party will, as appears by 18 E. 4. fol. 9. where it is held by all the Judges in B. R. That in any Bill or Writ, where Pledges are left out, that the party at any time, hanging this Plea, may finde Pledges, for that this is in the discretion of the Judges, and is but matter of form.

And with this agrees 2 H. 7. f. 1. where a Case was moved in B. R. one sues a Bill against another, in Custodia Marecalli, &c. after emparlance the Bill was blessed, and no Pledges found to pursue, Whether he might then, (being in another Term) put in Pledges or not; and Hussy being in Court, by advice he entered his Pledges: But he there took a difference between a Bill and a Writ: The Writ being, Si querens fecerit se securum, but so is not the Bill.

In this principal Case, another matter was moved, being this, That this being in a Declaration upon a Writ of Privilege, and no Privilege found: It was urged, that if he appear, this is good, and not to have an Attachment of Privilege to bring him in; if he appear gratis, this is good, without any Attachment; if a Capias be awarded to take one, for to make his appearance at such a time, and he appears, the Capias not returned.

Curia. This his appearance gratis, is good: But as to this last Error, Curia ulterius advisare vult.

### Ball Plaintiff, against Collis Defendant.

**I**n a case of Prescription. Nota, by

Coke chief Justice. If one prescribes to have the being of all the Clothes in A Presentation such a place, he ought here of necessity especially to aver, that he is sufficient for to use them; as the custom that one hath in Torchester, to have a common Bakehouse, he ought to aver, that his Oven there is sufficient to serve them all, and this was Sir George Farnors Case against Brook, Mich. 32 & 33 Eliz. in B. R.

A Presentation with an avement.  
Custom of Torchester, &c.  
1 Ro. Rep. 216.

Quelsh

*Quellsh & Uxor* Plaintiffe, against *Carpenter*  
Defendant.

A Writ of  
Error.  
1 Ro. Rep.  
210.

**I**f a Writ of Error, to reverse a Judgement given in the C. B. against them, in an Action upon the Case for scandalous words spoken by the Wife of the Defendant, in the Action: upon Non culp. pleaded, a verdict was found for the Plaintiff, (S.) Quod ipsi sunt inde culpabiles: Judgement there given? A Writ of Error brought to reverse this Judgement; the Error assigned, because the Jury found, Quod ipsi sunt inde culpabiles, the Words being spoken by the Wife onely.

It was urged, that this was no Error, but the Judgement ought to be affirmed.

Mich. 32 &  
33 Eliz. &c.

And so was it held in a Case which was, Mich. 32 & 33 Eliz. B. R. Rot. 53. Stanley Plaintiff, against Oxbeston Defendant, in an Action upon the Case for words, brought against baron & feme; and the words laid to be spoken by the Wife, upon Non culp. pleaded, the Jury found, Quod ipsi sunt culpabiles, a Judgement given for the Plaintiff.

Term. Trin.  
37 Eliz. &c.

Upon this, a Writ of Error was brought in the Exchequer Chamber, Term. Trin. 37 Eliz. and the same Error there assigned, as now in this Case, which Error was there over-ruled by all the Judges to be no Error, but that the Judgement was well given, and so the same was there affirmed: And upon this precedent shewed in Court, by Mr. Man, secundary.

Judgement  
affirmed, &c.

The opinion of the whole Court was clear, that this was no Error, but the Judgement was well given there for the Plaintiff, and so by the Rule of the Court, the Judgement was affirmed.

Nota, per Coke chief Justice. If one be delivered to the Sheriff, in Execution by the Kings Writ, he is by this presently in execution, and in his Custody, without his laying hands on him for to arrest him, and so is 7 H. 4. fol. 4. & fol. 30. and so hath always the constant practice been, as I have observed.

Nota, by Coke chief Justice. For a Rule observed in taking of Bail, upon a Writ of Error brought, if the Error assigned be matter in Law, then the use is to take Bail of the party: But if the Error be upon matter in fact, then the use is not to take Bail, before this matter in fact be tried; and so is the difference.

*Berry* Plaintiffe, against *Perry*  
Defendant.

Entred Mich. 12 Jac. B. R.  
Rot. 386.

1 Ro. 223.  
375.  
Cro. James  
399.  
Mo. 849.  
1 Ro. Abr.  
44. 350. 7.  
Debt upon  
an Award.

**I**f an Action of Debt, for the non-performance of an Award, the Case appeared to be this, The Defendant was bound in a Bond of 100 l. to stand to the Arbitrament of four men, of all Actions, &c. Ita quod, the said Arbitrament be so made, and delivered in writing, under the Hands and Seals of these four, or of any three of them; these of these Arbitrators made the Award between the parties, and delivered the same under their Hands and Seals of these three: An Action of Debt brought

brought upon this Bond, for not performance of the Award made.

So this the Defendant pleads in Bar, that the Arbitrators made no Award, and so no breach.

The Plaintiff replied, and shews the submission, as before; and also shews, that three of the Arbitrators did make an award, and did deliver the same under their Hands and Seals, the which the Defendant hath not performed, unde actio accrevit.

So this Replication, the Defendant demurred in Law.

So that the onely point insisted upon, was, Whether this award here so made by three of the Arbitrators, and delivered under their Hands and Seals, be an award well pursuing the submission, or not.

The Court, upon the first moving of this, was of Opinion, that this award is to be made by four, but the same may be given up by any three of them.

Coke chief Justice. Three of them may subscribe, but not make this award clearly; four are to make the award, or else the same is not good.

Dodderidge Justice. First, The submission is to four, and referred to their power to Arbitrate, so as the same award of the said Arbitrators, be made by four, or by any three of them, given under their Hands and Seals.

The whole Court at this time, upon the first moving of this, seemed to be strongly of opinion, that this award, upon this submission, ought to be made by all four of the Arbitrators, but the same may be well signified by three of them, otherwise there should be an apparent repugnancy.

Coke. All the matter rests upon this part (made) we will see the Books, and be better advised.

Dodderidge. (made) ought to be referred to the four, and the signifying of this award, to these four, or to any three of them.

And so without saying any more at this time, Curia advisare vult.

Afterwards (S.) Termin. Mich. 13 Jac. B. R. this Case was moved again, and urged for the Plaintiff; that this award is good, and that by the words, four or three may make the award. Term. Mich. 13 Jac. B. R. &c.

Coke. Four are to make the award, ita quod, the said award; this is to be the said award, made by four according to the submission.

Houghton Justice. By any four or three of them to be made, indented, and delivered, under their Hands and Seals; whether this refers to four or three, ita quod, the said Arbitriment, &c. here it may be in such a Case well distributed to four or to three, but not so in this principal Case, where the reference is unto four, and this way the whole Court seemed to incline.

Coke. All the point and difficulty rests here upon this word (made:) This shall be by four, and to be delivered under the Hands and Seals of four or three.

Dodderidge. Four to make this award, and three to put their hands to it, and so by this sense all the words stand well together.

Coke. There is here a clear Repugnancy in these words.

Dodderidge. But this Repugnancy, with this Construction, shall be made good.

Coke. Yet there is a Repugnancy here: It is clear, that four ought to make the award, yet his meaning peradventure was, that three might make the award as well as four, but we are not now to judge upon his meaning, so as the same award be made by four, and put in writing by three: The one may be a scribe-man, or may have other business, so that he cannot stay the writing of it.

Where it is left generally to be done, the common people call the making of it, the writing of the same; so four may, and ought to make it, but three may write and subscribe it: The submission here was to four, ita quod, the said award, &c. this to be of the four; Natura non facit saltum, Nec ars facit saltum, ita quod, the said award and Judgement, and this to be by four.

George Croke for the Plaintiff, informed the Court of a direct President, adjudged contrary to this they seemed to hold, which was, Termin. Pasch. 8 Jac. B. R. Term. Pasch. 8 Jac. B. R. Rot. &c.



Rot. 64. between Girling and Sallows : An debt upon an award, the submission was to four, ita quod, the said Arbitrators, or any three or two of them, do make their award of the premises in writing, under their Hands and Seals ; three of them made the award, and this award adjudged to be well made : But a Writ of Error was brought, and the Judgement reversed, because it was not shewed that this award, so by them made, was under their Hands : And it was urged, that arbitrium, est arbitrium boni viri, and therefore the same is to have a favorable sense and construction to be made of it.

Coke. I will be advised of this Precedent, cited to be adjudged in point, and I will see and peruse the same, and so for this time it was adjourned over, with a Curia ulterius advisare vult.

Term. Pasch. Afterwards, (S.) Termin. Pasch, 14 Jac. B. R. this matter was moved again, and  
14 Jac. B. R. long argued, (S.)  
&c.

By Sidnam for the Defendant, against the award :

And by Whitlock for the Plaintiff, that the award was well made, being by three of the Arbitrators, and the same well pursuing the submission : The Authority here given to the Arbitrators, est potestas alternativa, the same being to four or to three of them, and in the nature of a Commission, being potestas Delegata, 9 E. 4. fol. 43. b. touching Arbitrators ; a good Case, shewing of what things they are to Arbitrate, and where it is said that an Arbitrator is a private Judge, made by the parties : And as touching Powers, they are of three sorts, (S.)

Touching powers.

4 Eliz. Dyer.  
217. &c.

1. First, Ordinary powers created by the Law.  
2. Delegate powers, by Commission : And,  
3. Thirdly, Arbitrary powers, by the Parties.  
4 Eliz. Dyer, fol. 217. It is there said, that to every award there are five things incident, (S.)

1. The matter of the Controversie.
2. The submission to the Arbitrators.
3. The Parties to the submission.
4. The Arbitrators themselves : And
5. The making of their award.

Or every award consists of two parts, (S.)

1. The matter of the award : And,
2. The manner or form of the award.

So as the said award : This hath reference to the matter, but not to the manner of the award : And an Arbitriment ought always to have a benign and a favorable construction, the same being according to its definition, Judicium boni viri, secundum æquum, & bonum, and therefore to be construed favorably.

And here it is, so as the same award by them, or by any three of them, be made and given up : This power of making is materiall : And this, by these words, is given to them four, or to any three of them ; and that by the force of this (ita quod) which is conditionalis dictio, & coactiva, coactare precedentium, & denotare modum.

Coke chief Justice. If Repugnancies are here, as in the Cases of Interest, this is to be looked into, and to be weighed : I will look upon the precedent cited.

Dodderidge Justice. Without all question, the meaning of the parties here was, that this award might be made by them four, to whom the submission was, or to any three of them : It is one thing to make an award, and another thing to make this in writing, and to deliver this up.

Haughton Justice. The president shewed expounds the authority.

The Court seemed now to be clear of opinion, that the meaning here was of the parties, that these four, or any three of them might make the award.

Coke. I do as yet somewhat doubt of this Case, because here is but an authority,

ap, and no interest, and no such repugnancies shall be material in cases of authorities, as in Cases of Interests, to make a thing void.

And for this Case was again adjourned, for the Court to be better advised herein.

Afterwards at another time this Case was moved again, and argued by all the four Judges.

1. Haughton Justice. Recited the Case as before.

In this Case Judgment ought to be given for the Plaintiff. The point here only is this, whether by this submission there have power to them given as well as four to make the award; this power they have, and this award thus made by three of the Arbitrators, is a good award. And to prove this, it resteth upon the construction of the Bond. The first part of the Condition is for the performance of the award of four if he had stayed there, and said no more, then they all four were to have made the award, but he proceeds further with an (*Ita quod*) the said award by them, or by any three of them be made, and if this *ita quod* shall give any construction to the premises, is the sole question now to be discussed. And as to this the *ita quod* here hath enlarged their Authority given unto them by the first words. And also this (*ita quod*) hath here explained three things. (S)

First, Who ought to be the Arbitrators.

Secondly, In what manner their arbitrement is to be made.

Thirdly, The time before which the award ought to be made.

And all this stands well together, and may well be made parcel of the first part of the condition, and may also well explain this, shewing thereby what should proceed; And this is the nature of an (*ita quod*), which may either restrain or enlarge the premises. And this sense doth well accord with the rules of the Law for that, ex precedentibus & consequentibus, optima fit constructio.

Here in this Case he is not bound to perform the arbitrement of four, but with an (*Ita quod*) that this be made by them four, or by any three of them, of the said Arbitrators, or any three of them; the same arbitrement of four, or any three of them; these are the words of the condition; and if this award be made by three, yet by these words it shall be the same arbitrement, and so this is a good explanation of the former words, and that this shall be so, may be proved by many Cases.

35 Affiar. placito 14. Lands are given to B. and to his heirs for ever, (if he have heirs of his body) and if he have none, this to revert again to the first donor, here placito 14. the *ita quod* doth restrain the premises. So this particle (*Si*) sometimes doth expound, sometimes it doth expound, abridge, and explain.

3 H. 3. fol. 6. Land given to Baron & Feme, hereditibus eorum, & aliis hereditibus, 3 H. 3. fol. 6. of the Husband, *Si dicti heredis*, of the Baron and Feme should die without issue. This as in our Case, there *dicti heredis* taken for heirs of the body; the same construction as here. So here in this Case these words make for the plaintiff; here it is named the said arbitrement, notwithstanding it be made by three, and so this exposition makes all the words to stand well together, and to agree with the Rules of Law.

2 R. 3. fol. 18. By Husey, Fairfax and Catesby Justices, to the Exchequer Chamber: If three, and another man submit themselves to the award of one, of all demands between them, who hath power by this to make an award of all matters which the three have against the fourth, jointly, or of every matter, which any of the three hath against the other: If he award that one of the three shall give something to the fourth person, and that the other two shall be quit, and towert he saw that the fourth person owes to one of the three 20s. the which he awards to be paid unto him; and that he owes nothing to the other two, and doth therefore award that he shall be quit against them, this is a good award. And this is a good Case; if an award be made for any of the three, it is sufficient; for here this being in case of an arbitrement, the which is by instrument of Law to make Peace,

H. 3.

B

and

2 R. 3. fol. 12.

Coke 5 pars,  
fol. 103.  
Haughbions  
Case.

and to put a perfect end to matters of Controversies in question; and therefore in maintenance of such awards, a reasonable construction is to be made of them, and so it was in the Case of 2 R. 3. fol. 18. And to make this more evident, it appears Coke 5 pars, fol. 103. in Hungares Case, that an arbitrament is to be taken according to the true meaning of the parties, notwithstanding the words of this do enforce it otherwise; and so it shall be here in this Case, where the award made by three is a good award pursuing the submission, and so ought to have been performed by the Defendant; for non performance of which award the Plaintiff here had just cause of Action; and so Judgment ought to be given for him.

2. Dodderidge Justice Agreed herein, that Judgment ought to be given for the Plaintiff. By the condition of the Bond, he is to stand to the award of four *ita quod*, the same award of the said Arbitrators, or any three of them be made and given in waiting before such a day; these words at first do seem to have a shew of contradiction in them; and to carry this Exposition, so as the same to be made by four, and not to be made by three. But the difficulty is not great, if you will consider the context of these words, no speech being of an arbitrament to be made, until they come to these words, (S) by four or by three.

As touching arbitraments, these grounds are to be observed; If there be any contradiction in the words thereof, so that the one part cannot stand with the other; the first part shall stand, and the other be rejected. But if the latter be but an explanation of the former, there both parts shall stand. In 19 H. 6. fol. 37. It is there said, that Arbitrators are Judges; here they have only an Authority, and therefore the same ought to have a favourable exposition; *boni est judicis, licet dirimere*, Bracton, and this which is the cause of Justice, is not to be made the cause of injustice; So here in this Case, this which is the cause of peace is not to be made the cause of suit and contention.

*Arbitrimentum est boni viri arbitrium.*

As to the words here, they are to have such an exposition which may lawfully stand with the act done by them, and with the words also. In Plowdens Commentaries in Throgmorton and Traces Case; The intent of the parties is to be taken, if there be no absurdity therein; so here in this Case.

As to the words here in this Case, (*ita semper quod*.)

First, four are elected, the Obligation to stand to their award; afterwards there comes a modification, (S) (*ita quod*) the same award, (what award is this?) not of all four, but so as the same things committed unto them; The same award hath reference here to the things to them submitted, not to the persons to which the submission was, this comes in afterwards, where he speaks of that which is to be done; and this to be by four or three of them; and so the sense of these words are, (S) So as the same award of the things committed be made by four or by three of them. The same award of the said Arbitrators concerning the premises be made, (if it be demanded by whom) this to be;

The answer is, By them four, or by any three of them.

And so by such construction these words are plainly expounded. And if you will lay the parts of this together, it will then be manifest that by these words here, three had as good power to make this award as four had: And this (*ita quod*) both modify their power first to them given; and here by this be both explain himself in what manner he will be bound; and this is evident by this construction. That the same award doth not include the persons, but the thing submitted.

2 R. 3. fol. 18. award is called *arbitrium boni Viri*, and the same is not to be taken strictly, but largely in the point of submission, according to the intent of the parties submitting, and according to the power given unto them. And this appears to be so by 2 R. 4. fol. 18. before remembred, and by 19 H. 6. and 22 E. 4. fol. 25.

20 H.



20 H. 6. fol. 18. The submission was of a matter between him and another singularly, by this they may make an award for matters between him and another, which he hath in the right of his Wife, and so by this the same shall be taken largely, and this after the award made. The reason of this is, because an award is to make an end of differences and contentions, and to settle peace between the parties. And for this cause we ought to uphold such awards made, if by any means we can by the Rules of Law.

17 E. 4. fol. 3. Two submit themselves to the award of another, who doth award, that the one should deliver up the other, the Testament of his Testator; In an Action of Debt brought, the Defendant pleads, that he had delivered unto him literas testamentarias, and there adjudged, that by this he had well performed the award, for in effect all is one.

36 H. 6. An award is made for one to entfeoff J. S. who comes unto him, and requires him to entfeoff J. N. and him, to the use of him and his heirs; the which he doth accordingly, by this he hath performed the award, having pursued his intent, but not the words; and yet this a good performance. So that in Cases of awards, and the performance of them, the intent is to be observed, and so it is here in this Case, and no contradiction, so that this award here made by three is a good award, and the same ought to have been performed, which being not done, the Plaintiff had good cause of action, the Replication here is good, no cause of Demurrer, and so Judgment ought to be given for the Plaintiff.

Croke Justice. In this case Judgment is to be given for the Plaintiff, Animus hominis, est anima scripti. I will in this Case follow the intent, and see whether the same be against the words, or repugnant to them, or whether the words will bear a double construction, and then ex precedentibus & consequentibus optima expositio, we are not to make such an exposition, as that one part should overshoot the other; I will not in this Case distinguish between authoritics and interests, the one to surbibe, the other not. Nimia subtilitas, & Nimia curiositas in jure reprobatur, & qui heret in litera heret in cortice, Cases may be instanced to prove that Grants are to be taken according to the intent of the parties. Here the award is to be made by them, or by any three of them. In this and in all other such Cases, qui bene interrogat, bene docet. Ita quod, the same award 8 Eliz. 8 Eliz. Dyer. Dyer, this is to be referred ad rem, the same award of the same things be made by the said Arbitrators, or by any three of them: And so take the words in such a manner here, and there is no contradiction at all. Also such awards are always to be taken in mitiori sensu, ut res magis valeat quam pereat. In this Case here is a good award made; and being not performed, the Plaintiff had good cause of Action; and so Judgment ought here to be given for the Plaintiff.

Coke Chief Justice. The words here are, so as the same award; &c. The question is, whether this be meant of several, and whether there be any repugnancy in these words or not? prima facie, there seems to be here some kind of contrariety in these words; but yet upon a more strict and perfect view there is none; and in this it is like unto an optick Glass.

This arbitrement here is good, well made, and pursuing the submission. In this Case I agree in omnibus with the rest that have argued, and that for these reasons.

1. Because it is the office of every interpreter in all Cases, as well divine as Reasons humane; to find the true intent and meaning of the parties, if by any way this may be, and when this is once found out, then he ought so to marshal the business, that he swerve not from the rules of Law. And here the intent is very apparent, that four or three were to make this award; so that his intent is plain and perspicuous. The Bishop of Norwiches Case here was this, he made a Lease of all the demesnes of his Manor to one Derrick, in 25 E. 8. and further of Norhelmes, granted unto him the keeping of the Park; what is the office of a Judge here, to gather the in-

The Bishop  
of Norwiches  
Case.

lent of the party. It was adjudged here in this Case, that the Park, the soil thereof did not pass, but the custody of the Park only. Where the first words do cover all his demesnes, and the soil of the Park also. But the subsequent words do limit in what manner he intended this to be, and do also qualify his Grant. So here in this Case the submission is to four Arbitrators, (ita quod) this explains his meaning. To this purpose was the Case.

Hil. 34 Eliz. in the C. B. Rot. 120. Between Carter and Ringstead, the Case of Odiham remembred, 8 pars. fol. 118. in Doctor Bonham's Case, construction there of all the words. 1. There were general words which passed all his lands, but the words subsequent did well explain the former: and so it shall be here in this Case.

2. A second reason grounded upon the difference between an authority and an interest. In case of an interest it can hardly be severed or divided.

Brañon.

Tpin. 31 H. 8.  
Rot. 420. &c.

Bracton. Nihil tam conveniens, est naturali equitati, quam voluntatem domini, volentis rem suam in alium transferre, ratum habere. Where we are in Case of an authority. To this purpose there was a Case, Trin. 31 H. 8. Rot. 420. Bealofe, Sir Thomas Longford was seised of the Mannor of Langford, did grant unto one Fulgeam, and to another, the next Abbotsdon, & Habendum, eis, & eorum unj, conjunctum & divisim. Resolved, that this Grant was not good, because an interest cannot be divided; and with this agrees 14 Eliz. Dyer fol. 304. placito 54.

14 Eliz. Dyer.  
fol. 304. placito 54.

3. A third Reason, because we are here in case of an authority, being in Case of arbitrament, in which these things are to be observed. (S)

2 R. 3. fol. 81.

22 E. 4. fol.

25. Harringtons Case.

1. First, The parties submitting.  
2. Secondly, The thing submitted, — and  
3. Thirdly, The persons to whom. And in all these a favourable construction is to be had.

1. The persons submitting, as 2 R. 3. fol. 18. 22 E. 4. fol. 25. Harringtons Case. If three on the one side submit themselves to the award of, &c. If there be a joint Interest, this is to be respected, and also the interest of the persons.  
Mich. 29 & 30 Eliz. Beckwiths Case, & 6 E. 2. Brooke's Case, placito 49. As they are not to sever an interest, so not to sever a Covenant as there held, the persons to attend upon the interest on the Covenanters side, not to be severed; And so in Cases of Arbitraments.

39 H. 6. f. 9.  
Case 8, &c.

2. In the things submitted. By the Rules of Law, if these be joint, (S) of all Actions reals and personals, an award made of one only is good by the Law, 39 H. 8. fol. 9. is against this. But it is so resolved, 8 pars. fol. 97, 98. in Baiepoles Case. If a submission be made of three several matters, an award made of any one of them is good, and so is 8 Eliz. Dier, fol. 242. The difference is, If they submit three several matters, so as of all of them, an award be made, there the award is to be made of all, and if made but of one, the same is not good (but if these words be wanting (S) so as of all, &c.) there the Law will make things joint, to be several, and there if the award be made of any one of them, this shall be good, and to this purpose is 19 H. 6. fol. 6. 7 H. 6. fol. 41. 4 Eliz. Dyer, fol. 216. But in this Case here it is not so. The reason why arbitraments ought to have so great favour is this, when after a submission between me and another, and I have made him satisfaction according to the award, if after this so done, he will trouble me, and urge me to plead to him, for this vexation, there is a special Writ in the Register, fol. 111. called Breve de arbitratione facta. In which damages are to be recovered for the vexation, and it were good, that some one would bring this Writ.

19 H. 6. fol. 6.  
7, &c.

The reason why awards are to be favoured,

Quia expedit Reipublicæ, ut sit finis litium.

In 5 E. 3. the day of an award is called the day of Love, and Herl there saith, Ecce quam bonum, & quam jucundum, est habitare fratres in unum; and he there saith, That he remembred he was at one of those days.

Here in this Case all the parts of the Deed do take effect at one and the same time by the delivery; so as the same award by them, or any three of them be made.

All these words are to take effect together.

This award here is to be made by four or by three, nothing is here to be rejected: If these words, (S.) (the same) had been omitted, no question had there then been in this Case: But this (monosyllable) (same) I will not reject, but expound it (same) this to be of the matter submitted to them, (S.) of the premises: Be made by them or by any three of them.

Obj. It hath been objected, for what cause ought this to be so, this award being to be made by the said Arbitrators.

Resp. In answer to this, (same) is not here to be taken, (the same) which, idem 45 E. 3. f. 22. numero, but for idem substantia, and this is proved by 45 E. 3. f. 22. 46 E. 3. f. 32, 33, 34. 30 Assisar. placito 12. and Littleton, tit. Rents, f. 48. placito 222. If one hath a Rent-charge, and purchaseth parcel of the Land charged, by which all the Rent is extinct: If the other grants unto him, that he and his Heirs shall distrain, propter redditum eandem, adjudged that this shall be the like Rent. (S.) (redditurum similem) and with this agrees 8 E. 4. f. 21. (the same) taken for the same in substance, & viscerina expositio, quæ carodit vipera textus; so as it alters the construction of Law. Here in this Case the words which before were joyn't, by this (ita quod) are now made several.

As to the Case which hath been cited between Girling and Swallows; this comes not unto our Case, there the same hath reference only to the persons. Girling and Swallows case.

As to the making of Arbitraments, this hath always been my rule, the one to make a release presently to the other, and the other to make a Covenant, or a Bill obligatory for the payment of the money, to be paid by him by the award of the Arbitrators.

As to the pleading here. 1. The award is, That John Perry was to pay 50 l. if he have nothing awarded to be done to him, the award then is not good. Also too bound to another 30 Maij to stand to the award of — of all Differences, Suits, and Actions then depending; they may be depending 30 Maij, but not in April, and an Arbitrament shall never be aided by an Averment, as appears by 22 H. 6. fol. 39. and 16 E. 4. fol. 8, & 9. a good Case, but ill reported. 22 H. 6. f. 39. &c.

Also the pleading of the Award here is, That all Actions and causes of Actions shall cease; this is good, but it had been better to have said, That he shall go quit touching the Actions.

Obj. It hath been objected, That he ought to have alledged a breach of the Award, or no cause of Action; the award was to pay the money at or before such a day, the other saith that he did not pay it super &c.

Resp. Yet this is good, for if he did not pay it before the day, he did not pay it super diem: So that the award here is good, and the pleading is also good, and so Judgment ought to be given for the Plaintiff: And accordingly the Rule of the Court was, Quod judicium intretur pro querente. Judgment given for the Plaintiff.

### Perry Plaintiff against Berry Defendant.

It is a Writ of Error by him brought in the Exchequer-Chamber, before the Judges A Writ of Error in the Exchequer Chamber. of the C. B. and the Barons of the Exchequer, to reverse the former Judgment: The Errors upon which they relied were these, (S.)

1. One



1. One upon the assignment of the breach of the award, the payment being awarded to be made, ante vel super, such a day; for breach, it is said, that he did not pay this super diem, and doth not say that it was not paid ante diem: This Error was over-ruled by the Judges, for if it were paid ante diem, it was not then unpaid super diem.

2. A second Error, One was bound, this being submitted, the Arbitrators have made no award of this; the award being, that the said Obligation shall remain in full force unto the Plaintiff, and as it was objected, this is as no award at all: Judgment affirmed, &c. This Error was also over-ruled by the Judges, that the award was good, and that they could not have made a better award of this, to have this to stand and be in force. And so by all the Judges, Termino Hillar. 14 Jac. in the Exchequer Chamber, the Rule was, Quod affirmetur Judicium pro querent. in the first Action.

### Copper Plaintiff, against Dickenson Defendant.

Action on  
the Case for  
promise.  
1 Ro. r. 215.

**I**F an Action upon the Case grounded upon a promise, the Case appeared to be this, The Plaintiff had goods bailed unto him for a pawn or pledge in the presence of the Defendant, being a third person; he said, That if the other would not pay him his money, he would then sell the pawn to raise his money; Upon this the Defendant being present, said unto him, Keep the Goods until such a time by you, without sale of them, and if he do not then pay you, I will then pay you the money and take the Goods: Upon this he kept the goods by him without sale; the Defendant not paying the money according to his promise, unde actio.

Coke Chief Justice. This is a good conditional bargain and sale of the Goods.

Haughton Justice agreed with him herein.

Coke. If the Defendant had paid the money, and the other not delivered the goods, he might well have had for them an Action of Detinue.

Dodderidge Justice. If one have Wares purposing to sell them, another desiring to buy them, saith unto him, Do not sell them away, but tarry till such a day, and I will then pay you for them; this is a good promise, and a good consideration, for by this he is hindered in the interim from the sale of them.

Judgment  
given for the  
Plaintiff.

The Court were all clear of opinion, That in this Case here was a good consideration to raise a promise; and so by the Rule of the Court, Judgment was given for the Plaintiff.

Nota, 5 Stat.  
of 8 H. 6. &c.

Nota. That an Exception was taken to an Indictment upon the Statute of 8 H. 6. c. 9. of forcible Entry, for that it is therein said, quod adtunc & adhuc fuit firmarius; And if it be so that he was adhuc, &c. then there was no putting out, and so the Indictment not good.

The whole Court clear of opinion, That the Indictment was good, this Exception notwithstanding, for that he is firmarius still, though he be ousted, and shall pay his Rent: But if he had been adtunc, & adhuc existens liberum tenementum, &c. this had not been good, but repugnant in it self; but there is no repugnancy by saying here adhuc firmarius.

Another Exception moved, that they entred upon super possessionem intraverunt, not shewing that they did eject him.

Curia. This shall be so intended, so the exceptions were over-ruled, and the Indictment good, per Curiam.

## The KING and Arden.

**N**Ora, In the Case of Robert Arden, his Council moved the Court for to have a Copy of the Attainder of Edward Arden his Ancestoz, intending to bring a Writ of Error to reverse the same.

Coke Chief Justice. By 22 E. 3. and by all the Books, if one be attainted of Treason, no Writ of Error shall be brought of this, without a Petition before made unto the King, to give his allowance unto this. 2. If one attainted of Treason, and executed for the same, as the Ancestoz of Arden here was, no Writ of Error is to be brought of this at all, for the inconvenience that may happen, you cannot have a Copy of the Attainder: If you can obtain leave of the King to prosecute this in this manner, (by a Writ of Requests) yet I will not grant this unto you, before I have spoken with the King: For that this is a dangerous thing, and if this course should be allowed of, by this way all attainders might be searched into by Writs of Error, which is not to be suffered; and so by the whole Court this motion was denied.

**N. 1.** An Exception taken to an Indictment upon the Statute of 8 H. 6. cap. 9. of forcible Entry, because it is not therein shewed, in whom the Freehold was. *Nota, upon the Statute of 8 H. 6. cap. 9.*

Coke Chief Justice. Clearly this ought to be shewed, and to say disseisin & intraverunt, &c. the Statute saith expressly, Disseise, and therefore Tenant by Elegit, or by Statute Merchant, cannot endite one upon the Statute of 8 H. 6. but he ought to shew that he did him expulse and disseise the Reversinger.

**Curia.** But this may be upon the Statute of 5 R. 2. cap. 7. He ought to pursue the words of the Statute, Ubi ingressus non datur per Legem, ibi non, &c. *Stat. of 5 R. 2. cap. 7.*

Coke. This is not good upon the Statute of 5 R. 2. manu forti & illicite, are not equipollens, he ought precisely to pursue the words of the Statute: So was it in one Slays Case, an Indictment upon the Statute of Mury, of 37 H. 8. cap. 9. Touching a corrupt Bargain, there it was said, that he did lend money, and did take more then after the rate of, &c. but did not lay it to be a corrupt Bargain; this was not good: So an Indictment for cutting of a Purse, if he doth not say that this was done, clam & secrete, the same not good: he ought to pursue the words of the Statute: Also the conclusion here is not contra formam Statuti. *Stat. of 27 H. 8. cap. 9.*

**Curia.** Clearly this Indictment is not good, and for these Exceptions the Indictment was quashed per Curiam. *Indictment quashed, &c.*

## The Corporation of Colchester against, &amp;c.

**N**Ora. By Coke Chief Justice, and the whole Court in this Case of Colchester concerning their Corporation: That if there be a popular election of the Mayor and Aldermen in Corporation Towns, and this happens to breed confusion amongst them; this may be altered by their Agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise: But if by their Charter they are to be elected by them all, then this is not to be altered, but by and with the general assent of the whole Town, and so by this means to take away confusion. *Nota, Touching Corporations. 1 Ro. 1. 333. 2 Ro. Abr. 456.*

## Baker Plaintiff against—Defendant.

Action upon  
the Case for  
words.

1 Ro. Rep.

227.

1 Ro. Abr.

80.

Coke 4 pars.  
f. 17. b. &c.

Judgment  
given for the  
Plaintiff.

**I**n an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was given for the Plaintiff: It was moved in Arrest of Judgment, that the Declaration was not good, the same being, That such a one named Carolus being of good name and fame: The Defendant dixit de pio-aro Carolo; where is this Baker, Innuendo, the said Carolus Baker: 3. he hath taken a false Oath, and I could make him look through the Billoze.

It was urged, that this Declaration is not good, because there was no Bikes spoken of before, and the Innuendo will not make this good; and to this purpose the Case between leames and Rudech was cited, Coke 4 pars. fol. 17. touching the force of an Innuendo.

Coke Chief Justice. The Declaration here is good and sufficient: If one shall say of a Counsellor, where is this Counsellor, Innuendo such a one, this is good.

Dodderidge Justice. If one shall say, your Father-in-law is forsworn, Innuendo J. S. your Father-in-law, and so laid in the Declaration, this is good.

The whole Court clear of opinion, That the Declaration here was good, and accordingly the Rule of the Court was, Quod judicium intretur pro querent.

## Hornigold Plaintiff against Bryan Defendant.

Debt by an  
Executor.

1 Ro. Rep.

226.

2 R. 2. &c.

Bracton.

**I**n an Action of Debt, brought by the Plaintiff as Executor, he being Executor ratione testamenti, from this Will; the Defendant by way of Plea appeals, whether he may have this plea for to appeal, or not, after which there remains now no Will proved, for that this appeal doth suspend the proof of the Will; yet as it was urged, that he still remains an Executor to be sued, but not to sue, 2 R. 2. Fitz. Quare Impedit, placito 143. If a Judgment of Deposition be given in Caput Christian against a person for his Benefice; if presently upon this Judgment he makes his appeal, the Church is not void, but he remains Parson during all the time of this appeal; for if by this he doth reverse the Judgment, he shall need no new institution and induction: As if a Judgment be given of a Divorce in Court Christian; and this is afterwards reversed by an appeal, there shall need no new Marriage.

Dodderidge Justice. It appears by 39 E. 3. and Bracton, that if the matter to be tried be fil loyal occuple, ou nemy: The Bishop certifies, &c. loyalment accouple: No appeal lieth of this, and so in Case of an Excommunication, no appeal to be allowed.

Coke Chief Justice, 39 E. 3. hath the same Case: And if an appeal be from a Sentence of Divorce, they are not by this Baron and Feme again; so if a Parson be depozed, and appeals, he is by this Parson again, and may have an Action of Trespass: And as touching this Plea here, the same is but a shifting Plea; he ought here to have demanded Oyer of the Testament, and not to have appealed from this.

Dodderidge. Proof allowed of there, is by two ways, (S.) 1. By insinuation; & 2. In comuni forma, by shewing of literas testamentarias.

Coke. By 38 H. 6. You may demand Oyer, and have it, but you cannot say that the Will is not proved, neither can you appeal from this.

Dodderidge



Dodderidge. The reason why an Executor is to be sued, but not to sue before Probate is, because that before he doth sue, he ought to publish unto all by the Probate that he is the Executor.

Coke. The reason why an Executor shall be sued before Probate, because that otherwise very great mischief might happen, for that a bad Executor would never then prove the Will.

Houghton Justice. Notwithstanding this appeal, all things before lawfully executed shall be and remain in full force; so that here was once a full Executor by Probate, and so he remains. If one brings an Action of Debt as Executor, and shews forth literas testamentarias, hic in Curia prolatus, these are not shewed to the party, but to the Court, and this he cannot Traverse.

The Court at last were all clear of opinion, That the Defendant could not have this Plea of appeal in this Case, this being in effect as much as to say, that the Will was not proved, and so for the mischief and inconvenience which may hence ensue, he shall not have this plea: for he may Traverse the Probate, if he shew it not in Court, or he may demand Oyer of the Testament.

And so the Court were all clear of opinion, That this Plea of appeal, where he shews forth literas testamentarias, is not good, nor to be allowed of to him, this being only (as before the Court observed) but a shifting Plea, and so the same was disallowed of by the whole Court; and therefore the Rule of the Court was, that the Defendant should put in a better Plea, or that Judgment to be entered against him upon a Nihil dicit.

Coke & Dodderidge. Clearly by the Appeal the Probate is disallowed, and so remains as not proved.

But by Coke & Curia, If this Plea of appeal should be here allowed of, this would be a great mischief to all Executors, for then this plea might be made in all Cases against Executors bringing of Actions.

As touching this matter, vide Coke 6 parts, fol. 18, & 19. in Packmans Case, where the difference is put between a Citation, which is to countermand, or to revoke former Letters of Administration, and an Appeal, which is always to reverse a former Sentence; for the Appeal doth suspend the former Sentence, but not the Citation.

And as touching this learning of Appeals, there was a famous Case in the Court of C. B. about 5 or 6 Jac. a Worcestershire Cause, between Lechmere Plaintiff <sup>Lechmere against Carr</sup> and Carr Defendant, in an Action of Trespass, and upon Non culp. pleaded, a special Verdict was found, upon which special Verdict, the Case was this, That Bonner was made Bishop of London in the time of King H. 8. and so he continued until 2 E. 6. at or about which time a Commission issued forth to the then Lord Chancellor and others, to convent Bishop Bonner before them, and to examine him; and if they found him to be contumacious, and would not answer them, the Commissioners were impowred then to Impison him, or to depribe him: The Commissioners upon this did first Impison him, and afterwards proceeded farther against him to deprivation: Bonner from this appealeth (and his appeal not heard: ) Nicholas Ridley is made Bishop of London, who makes a Lease of the Park and Hammoz of Bashley, under which Lease the Defendant claimed.

Afterwards, (S.) primo Maria Ridley is declared to be a Usurper, and Bonner by a Sentence definitive is restored again to the Bishoprick of London, and makes a Lease of the premises demised unto the Plaintiff.

Upon which special Verdict, the points stirred were these.

1. Whether the Depriuation of Bonner was lawful, or not: The authority by the Commission being in the disjunctive, (S.) To Impison or to depribe him; and (as it was urged) they first impisoning of him had thereby executed their authority, and so then the deprivation void.

2. Secondly,

2. Secondly, Admitting the deprivation void, then Bonner still continued Bishop of London: And then Ridley was never Bishop; for that there could not be two Bishops of London, Simul & semel; and so the lease by him made to the Defendant was a void lease.

3. Thirdly, Admitting the Depzivation good. Then quid operator, by the appeal, Whether it did not suspend the sentence of depzivation: and if so, then again Ridley was no lawful Bishop, and so the lease under which the Defendant claimed was void.

This Case was learnedly argued by Common Lawyers, and also by Civilians, and the Judges inclined to be of opinion for the Plaintiff. But the Defendant perceiving this, preferred his Bill in Chancery, and there obtained a Decree against Lechmere.

### Termin. Mich. 13 Jac. Banco Regis.

*Lowe* Plaintiff against *J. S.* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 114. & 130.

Action for words.

1 Ro. r. 255.

2 Cr. 399.

1 Ro. Abr.

44, 45.

Co. 4 pars, fol. 20. in *Barham's case*. Stat. of 1 Jac. cap. 12.

**I**F an Action upon the Case for slanderous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff. It was moved in Arrest of Judgment, that the words were not actionable, which were these, (*Qz. Lowe is a Witch* and *I will prove it, for I have seen him, and his pimps and evil spirits appear unto me in my Chamber, and put me in fear of my life. And he said, come, they will never be at quiet till we have killed him. And he did bewitch a Child of mine.* That these words are not actionable, because it is not alledged that he did any hurt, and such words shall be taken in mitiore sensu, as it is Coke 4 pars, fol. 20. in *Barham's Case*; and without laying, that he did hurt, he is not to be punished by the Statute of 1 Jac. cap. 12.

Coke Chief Justice. To have wicked Spirits, is a plain demonstration that they are Witches. If one saith of another, that he hath conference with wicked Spirits; these words will bear an Action, the speaking of these words here is a plain slander, if the Devil comes to them, or they go to the Devil, all is one, if they consult to do harm, this is a slander. But for one to say, that such a one is a Witch in anger; these words are not actionable.

The whole Court agreed with him herein. And so the Rule of the Court was, Quod Judicium intretur pro querente.

Judgment

per Curiam

pro querente.

Judgment re-

versed.

Nota, That afterwards a Writ of Error upon this Judgment was brought in the Exchequer-Chamber, and there held by the Judges, that these words were not actionable; and so the former Judgment for this cause was there reversed.

*Sneade* Plaintiff against *Badley* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 861.

Action upon

the Case for

words, &c.

2 Cr. 397.

1 Ro. r. 244.

**I**F an Action upon the Case for words spoken by the Defendant, thereby Slandering of the Plaintiffs title to certain Lands, upon Non culp. pleaded, a verdict was found for the Plaintiff, and damages given.

It

It was moved in arrest of Judgment, that as the words are laid in this Declaration they are not actionable.

In the Declaration it is laid in this manner, that the Plaintiff was seized in fee simple by a good title of the Manor of Colenorton, that he had a purpose upon a Marriage to settle this on his Son, and also to make certain Leases.

That the Defendant did speak and utter these false and malicious words (S) *Mr. Snede hath no more right or title to the Farm or Manor of Colenorton, or to any part or parcel thereof than a meer stranger hath, he shewing that he hath this by title of descent from his Brother. And that by reason of these words thus spoken, minus sufficiens fait, according to his purpose to settle this or any part thereof upon his Son for his preferment, or to make any Leases, sed inhabilis existit, unde dicit quod deterioratus ad damnum de, &c.* That these words, as the Declaration is, are not actionable, because he here shews only a purpose he had to do so, but not any Contract agreed upon. Like unto the Case between Sell against Facy, Mich. 12. Jac. B. R. an Action upon the Case for words, whereby bringing him in his Marriage, and this laid with a Conatus suit, to marry such a one, and resolved not good, without shewing that there was a speech of marriage, and there this principal Case was put by Coke Chief Justice, that he ought to shew there was a speech for the sale of his Land, and that the same brake off by reason of the words.

*Sell and Facy  
Mich. 12 Jac.  
B. R.*

Haughton Justice. The Action here well lieth without any such special allegation; for if one hath a good title, and another will slander his title, in such a manner this will keep and disswade all men from buying, or from dealing with him for this; and therefore though he doth not lay in fact, that he was about to sell this; yet these words are actionable, without any present intent shewed to sell this. For these words do hinder the sale to be made afterwards by him.

But here the Declaration goes further, it being therein expressed, that by reason of these words he could not convey and settle this on his Son, and that so by reason of these words thus spoken, multipliciter damnificatus fuit. For that none would take leases of him.

Dodderidge Justice. To maintain an Action upon the Case for words; these two things are requisite (S) *damnum & injuria.* This is an injury offered to him, to say that he hath no title. The damage which is laid, because he was in speech, and had a purpose to convey and settle part of this on his Son for his preferment, this is no damage, for notwithstanding these words, he may well settle this on his Son if he will; so that here is *injuria sine damno.*

Coke Justice. There will be a difference, where one doth slander and vitable the person of another, as where one being an heir, the other saith, that he is not heir, but a bastard, an Action upon the Case well lieth for this; as it is resolved in *Ann Davies Case*, Coke 4 pars. fol. 17. in *Banisters Case* there cited to be Termin. Trinity, 25 Eliz. B. R. here in this Case the Slander is to the title of the Land; and this is no slander without damage; and this cannot be without laying that he was in contract and speech for the sale of this land, and that by reason of these words he could not sell the same, neither is it laid here, that he was in speech to make Leases, nor that he had contracted for them for a certain sum of money to be by him received for the same; and so for these defects, these words as they are laid in this Declaration are not actionable.

*Nota le diff.  
Coke 4 pars.  
fol. 17. in Ann  
Davies Case.  
Banisters case  
there.*

Dodderidge Agreed with him herein; that these words are laid to bar in this Declaration.

Haughton. The Case put in *Anne Davyes Case*, is for calling of one Adulterer. Of themselves these words not actionable, but with the circumstances there added unto them they shall be actionable; as if a speech of Marriage was laid, and a loss of the same by reason of the words; so here is a slander of his Title.

Coke & Dodderidge. These words here as they are laid are not actionable.



And so the Rule of the Court was (s)ilence Coke) that proceedings to stay till moved again by the other side.

Afterwards on another day this matter was moved again, and urged for the Plaintiff, that the Declaration was good, and the words actionable; and a Precedent cited, Coke lib. Entrees, fol. 35. entred Hillar. 3 Jac. B. R. Rot. 519. Sir Thomas Gresham Plaintiff against Gansley Defendant; by which Precedent this Declaration was drawn, and no particular Cause there laid; here it is laid that he did slander his title.

Coke Chief Justice. For to call one a Thief, or a Villain regardant, &c. This is good cause of an Action upon the Case; without any aberrment here in this Case, the Plaintiff being seized of a Manor: another saith unto him, you have no right unto this. I do somewhat doubt of these words, whether actionable. I have never seen an Action upon the Case brought for slandering of the title of any Land, if no certain detriment be alledged to come unto him by the speaking of the words; here it is set forth in the Declaration in this manner (S) habens propositum, this is not good, being too barely alledged. This difference is to be observed, that an Action upon the Case for words, which do tend to the slandering of the person of one, may be without any aberrment; but not so where the words are for slandering of the title, here it is said, habens propositum & intentionem, this is not good; but if he had said, habens colloquium & propositum, this had been good cause of Action; we ought not to give too much way to Actions upon the Case for scandalous words, unless that the slander be apparent. And so for this time this Cause rested upon a Curia ulterius advisare vult, and was adjourned.

Term. Pasch.  
14 Jac. B. R.  
&c.

Afterwards (S) Termin. Pasch. 14 Jac. B. R. this Case was moved again.

Coke Chief Justice. If one should say, that I have no title to my Manor of Stoke. If these words do not hinder me in the sale of it, or of making Leases thereof. I shall not have an Action for this, and this is to be certainly expressed in the Declaration, and also the same is to be proved upon the evidence.

28 H. 6. fol. 7.

In 28 H. 6. fol. 7. Sciens canem consuetum ad mordendum oves; this sciens is not traversable, but the same is to be proved; if he hang the Dogge at the first time no Action lieth, otherwise if he suffer him still to use this. A trial was had before me in an Action upon the Case for words, which were, the Plaintiff being in speech of Marriage, the Defendant did say of him, that he had a Bastard, and that by reason of these words the Marriage broke off; and so being damaged by this, he brought his Action, and it was proved on the other part that the Marriage was broken off before the words spoken, and by reason of this the Verdict was found against the Plaintiff. Here it ought to be shewed certainly that he was damaged by reason of these words thus spoken; he is to shew the speech and communication here in this Case, it is only said, habens propositum & intentionem, to convey unto his Son this his allegation in this manner is not material, there being no certainty in this; this is like unto the Case here before adjudged of Conatus fuit, to marry such a one, this not good, resting only in intention and nothing in action, he may here convey unto his Son if he will, notwithstanding this which has been said, and his Son would not have refused this.

Dodderidge Justice Agreed herein, but a difference there may be between a stranger and a Son. The other Judges all agreed herein against the Plaintiff. And so the Rule of the Court was, Quod querens Nil capiat per billam.

Judgment  
for the De-  
fendant.

*Phelps Plaintiff against Winchcomb Defendant.*

Entred Termin. Hillar. 9 Jac. B. R.

Rot. 259.

**I**n an Action of false Imprisonment brought by the Plaintiff against the Defendant, being a Deputy-Constable, for Arresting and Imprisoning of him: where in the question was,

1. Whether a Constable may make a Deputy for to Arrest one, upon a Writ to him directed by a Justice of Peace, (the Constable himself being sick.)

2. And then a second question was, Whether such a Deputy-Constable, upon an Action brought against him, and found for him, be such a person as may plead, and by pleading may have the benefit of the Statute of 7 Jac. cap. 5. to have double Costs, or not.

It was urged for the Plaintiff, that he being a Deputy, is no such person as may take benefit by this Statute.

And it was also urged, that a Constable cannot make a Deputy, without special words for the same.

And for this, 10 E. 4. fol. 18. was cited: A Constable ought to be idonea persona & habilis to perform his office, and by his Oath he is to execute such things as do belong unto him by reason of his Office, a fortiore; here he having this special Warrant to him directed, ought to execute the same himself.

By 14 H. 4. fol. 34. and 31 lib. Assisar. If a Writ be directed to the Coroners, there being three, they all ought to execute this Warrant, for the same is to be executed according to the direction.

Coke Chief Justice. As to this, if in Judicial matters there any two of them may do this; but if it be in matters Ministerial, there all are to do it, and this is the difference.

It was then urged, that here he could not make a Deputy, this Warrant being specially directed to the Constable himself by a Justice of Peace, & 7 E. 4. f. 14. cited of an excommunication, certified under the Seal of the Commissary of the Bishop: That the Justice of Peace may direct his Warrant to the Althing-man, or to any other, and no inconvenience may thereby ensue.

And as to the Statute of 7 Jac. cap. 5. It was urged, that the Deputy of a Constable is not a person within the intent and meaning of this Statute.

Coke. In divers places the Custom is, that they do use in such Cases to make a Deputy, as in London; the Writ is, Vicecomiti, he makes his Deputy the Under-Sheriff.

At the first, an Earl had the Jurisdiction of the County, and their Commission was, (S.) Commissimus vobis, and therefore he is called Vicecomes, Commissimus vobis, custodiam comitatus, ad voluntatem nostram, and the Sheriff comes in his place, in loco vicecomitis; and all Sheriffs have their Commissions in this manner, ad voluntatem nostram: If this be so, and that in his Patent no mention is made of any Deputy by him to be made; what is the reason then that he may exercise this his place by Deputy.

It was then answered, that what the Under-Sheriff doth, he doth the same in the name of the High Sheriff.

An Action of false Imprisonment.

1 R. r. 274.

Mo. 845. 847.

1 Ro. Abr.

591.

Stat. of 7 Jac. cap. 5. Costs.

14 H. 4. f. 34. &c.

Stat. of 7 Jac. cap. 5.

Coke.

Coke. And so it shall be here in this Case, and this doth well agree with all the Books remembred, and the Custom will aid this also.

Croke Justice. Sub vicecomes is a person of whom our Law takes notice, and so the Custom may be for sub constabularius; all this is so used in London, and a Deputy Alderman there made.

Coke. This the first Case of this nature that was ever questioned.

Dodderidge Justice. Of Officers there are these two kinds, (S.) A judicial Officer, and Ministerial; a judicial Officer cannot make a Deputy, because he is called to do Justice; otherwise it is of a Ministerial Officer, who may make his Deputy: But yet distinguendum est, All Returns made by him ought still to be made in the name of the principal Officer, and not in his own name; here the Office of a Constable is a publick and a very necessary Office, and you ought not to straiten him being sick, and so unable to execute the place in person, as that he should not make a Deputy.

At the first, in the first Government the Earl made his Deputy, (S.) The Sheriff and he also made his Deputy, (S.) the under-Sheriff and his Bayliffs arrants within the County, called the Sheriffs of the County, and no warrant yet for them to do so, but the same was still so done.

But as to the Statute of 7 Jac. cap. 5. for double Costs, this extends only to the Constable, and by this Costs are given to him only.

Coke. The Under-Sheriff is never sworn, but the High Sheriff, and he is to answer for all, and it shall be so also in the Case of a Constable: He is not to be confined always to his House: No word there is in the Charter for a Deputy Alderman, and so here: A Justice of Peace may make his Warrant to have the party to be brought before him.

As to the Statute here of 7 Jac. for Costs; by this Statute double Costs are given to a Constable; and a Deputy Constable is within the intent and meaning of it, for that he is a Constable pro tempore; so a Sheriff is named therein, and his Under-Sheriff shall have benefit of this also.

Haughton Justice. A Justice of Peace may make his Warrant to the Constable to take such a one, and to bring him before himself, as it was resolved by Way Chief Justice in Sir Nicholas Bacon's Case, in which there is a great inconvenience, for it may be a great way to come unto him; but usually their Warrant is in this manner, (S) To bring the party before him, or before some other Justice of the Peace.

Coke. Majors may make Deputies; and so of Deans; this is usual, and will you restrain this Constable here, that he may not so do, but he always tied to his House; this is a very plain and a clear Case, that he may well make a Deputy.

Also upon the Statute of 7 Jac. cap. 5. for Costs: A Deputy is the person of the Constable, and so within the Statute: A Commissary is not to certify but in the name of the Ordinary.

The Statute of 35 H. 8. gives power unto a Justice in Eyre to make a Deputy, but not so at the Common Law; for the King cannot make us Judges to us and to our Deputies: This Case here now in question before us, is a very clear Case.

1. That a Constable may well make a Deputy. And 2. That this his Deputy is within the meaning of the Statute to have double Costs; the Case of the Under-Sheriff doth much lead and induce me to be of this opinion.

The whole Court agreed herein in Opinion in both Points against the Plaintiff, but no Judgment was given, the same for this time being adjourned, and was never moved again, but ended (as I heard) by agreement between the parties, perceiving which way the Court inclined in their opinion against the Plaintiff.

Whether a  
Constable  
may make a  
Deputy.

No Judg-  
ment given,  
Sec.



## Moor Plaintiff against Salter Defendant.

**I**s an Action upon the Case, for diverting of a Water-course : The Case appeared to be this, That a Water-course was granted in the time of King E. 1. and afterward by another Grant and Confirmation, this was increased one foot more; afterwards the original Writ of this, and of the increasing of it, was left in the Custody of Baron Snig, and by casualty of fire the Seal of this was melted off; in this Action the Defendant being a mere stranger, and Owner of the Land, pleaded a Special Non est factum.

An Action upon the case for a Water-course.  
1 Ro. Rep. 188.

Upon this the Court was moved that he might plead the General Issue, and then the Jury might well find all the special matter for the Court to judge upon.

But upon this Plea the Writ is to be shewed here in Court, and then it will appear to be no Writ, because it wants a Seal.

Coke Chief Justice. We cannot aid you in this, for if his Right depend upon a Writ, if he lose his Writ, by this he loseth his Right, and no remedy here for him.

Curia, (absent Dodderidge) agreed with him herein.

Afterwards the Book of 43 E. 3. was remembered, being, that if one hath a Writ, and the party from whom he had it takes the Writ from him, and pulls off the Seal; that he may plead this Writ without shewing of it, but shall plead that his Adversary had done this: It was urged, that Ne granta pas; a Stranger may plead, but not Non est factum; but an Executor may plead Non est factum: And in this principal Case Baron Snigs affidavit was shewed, proving the verity of all this.

The whole Court made answer, that this would no ways at all move them.

Nota, That afterwards upon this Action brought for diverting of this Water-course, the Plaintiff claiming the same by Prescription; upon Non culp. pleaded, a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that the Trial here was not good, the Prescription for the Water-course being laid to be in one Parish, to have a Water-course to his Close in another Parish; and upon Non culp. pleaded, the venire facias was for a Jury of both the Parishes, whereas the same ought to have been but of one of the Parishes, (S) Of the Parish in which the diverting is laid to be: If the Prescription had been traversed, there the venire facias to have been of both Parishes: But when he lays here the Prescription in one Parish, and the diverting in another, and Non culp. to this pleaded, this goeth only to the place where the diverting was alleged to be, and not unto the other, and therefore the venire facias ought to have been of this Parish only.

Hill. 37 Eliz. B. R. Rot. 1004. between Banning and Bag, this difference was here resolved; if the Prescription be traversed, there the venire facias to be of both places; but where Non culp. is pleaded, there the venire facias to be only of the place, where the diverting is laid to be.

Dodderidge Justice. The ground of the Action here is the Prescription, and Non culp. being pleaded, this goeth to all before alleged, and here the Prescription is to be proved, and therefore the venire facias ought to be of both the Parishes clearly, and the same being so here, is well awarded.

Houghton Justice. In an assise for disseising one of his Common in one place, and he claims this by Prescription in another place, the Venire here is to be of both places.

Dodderidge agreed with him herein; and it is clear, that if the Prescription be in Issue, as it is upon Non culp. pleaded, all is here put in Issue, the Venire facias is to be of both places; but if the parties be upon a special Issue, that he did not divert the same, and so are upon this only; touching the diversion, here the Venire facias is to be only of that place where the diverting is laid to be.

Another Exception was taken to the Declaration, because he doth not lay, that he was possessed of, &c. at the time of the diverting.

Dodderidge. When he lays the possession in himself, for divers years before the Action brought, it is to be intended that he was still so possessed at the time of the diverting; and this is plain, for it is here alledged that he was seized on the day of, &c. ipsoque sic existente, divertit, &c. this is well and sufficiently laid.

The whole Court agreed with him herein, that the Declaration here was good, and the venire facias well awarded; and so by the Rule of the Court, Judgment was given for the Plaintiff.

### *Belfield Plaintiff against Adams Defendant.*

An Ejectione firmæ, trial at the Bar.

1 Ro. Rep. 256.

1 Ro. Abr. 501. 2. 871. 2. 506.

What shall be said to be a forfeiture of a Copyhold Estate, what not.

**I**n an Ejectione firmæ, a Trial at the Bar by a Hertfordshire Jury was had, upon a Lease made by one Southcot, of a Copyhold Tenement, parcel of the Mannor of Bushy.

In evidence to the Jury for the Plaintiff, the same rested upon two things.

1. Upon a forfeiture of the Copyhold Estate. 2. Upon the surrender of this Estate, by the acceptance of another Estate.

1. The matter of forfeiture was this, (S.) because that for the space of three years the Copyholder had not done his Suit at the Lords Court; Whether his not coming to the Court to do and perform his Suit, whether this shall be any cause to forfeit his Copyhold Estate.

It was urged, that this should be no forfeiture, unless that he denied to do his Suit, and that no such Custom there was to have a forfeiture for non-ficans of his Suit within three years.

Houghton Justice. You ought to prove, that he had knowledge given to him of the time when the Court was to be kept; and also to prove, that this was in him a wilful refusing by him to do his Suit, and so a forfeiture.

Dodderidge Justice. A Copyholder may withhold his Suit, and this is only finable; but by 42 E. 3. fol. 25. If a Copyholder do deny his Suit, this is a forfeiture, and therefore you are to prove that he had warning of the Court, and refused to come to do his Suit.

Croke Justice. If it had been here said, Renuit, or Recusavit, to do his Suit, this had been a forfeiture; but here it is only laid, that he did withhold his Suit: Presumption was then alledged to prove this to be a forfeiture, because at the next Court-day he came into the Court, and did there take a new Lease, (S.) to himself for his life, after to his Wife for her life, and after to his Son.

The whole Court agreed herein, that this was no forfeiture, if you cannot prove a warning by the Lord given to his Copyholders of the time of his Court to be held, for the Lord may hold his Court when he will.

Dodderidge. The Copyholder may be dwelling far off, and without hearing of the Court; and his refusing to come thither to do his Suit, unless this be so, and the

the same directly proved, there can be no forfeiture: Here the withdrawing of his Suit is only fineable, and no cause of forfeiture.

2. Another forfeiture was here alledged, for the cutting down of Trees: To which was answered, that this was no forfeiture, being warrantable by the Custom; this being Coppelhold of Inheritance; but otherwise it should be of a Coppelholder for life.

3. As to the other point of forfeiture, (S.) the Surrender: For that the Case was this—

Robert Smith, a Coppelholder in Fee-simple, 2 Eliz. comes into the Lords Court; and there takes a new Estate from the Lord of this Coppelhold, (S.) To himself for his life, after to his Wife for her life, and after to his Son for his life; Whether this act of his, and new taking in this manner, be a giving up of his Estate of Inheritance, or not.

It was urged that it should not so be, but peradventure, if he had only taken an Estate to himself for his life, it might have been so; but not here as this Case is, being a taking to himself, to his Wife, and to his Son, to him and to his Wife for their lives, and after to his Son; this shall be no giving up of his Inheritance, but the same shall only enure by way of Surrender.

A Case remembered in the C. B. 36 & 37 Eliz. entered Hillar. 36 Eliz. Rot. 264d. 36 & 37 Eliz.  
C. B. &c.  
between Adams and Shepherd, where Robert Smith the Son claimed the Coppelhold of Inheritance; to this, the others pleaded the said acceptance to him, to his Wife, and to their Son, and upon this point, a Demurrer was there joyned, and there adjudged this later acceptance, to be a giving up of his Inheritance.

Haughton Justice. The Grant here was, of the Reversion unto Southcot, To have and to hold (and doth not say the Land) but the Reversion; whereas in the Commentaries, in Adams Case, it is there, To have and to hold the Land.

Dodderidge The Reversion, est terra revertens: As to the taking here by him, for his life, the remainder to his Wife for her life, the remainder to his Son for his life, this amounts but unto a Surrender, to the use of himself for his life, the remainder to the use of his Wife for her life, the remainder to the use of his Son for his life, and this amounts but unto a Surrender, to this effect, admitting there be no forfeiture in the Case.

Haughton. If Lessee for 1000 years, takes a new Lease but for five years, this is a Surrender of his first Lease; and so it shall be, if a Coppelholder do take a Lease by Indenture of the Lord of his Coppelhold Estate, this is a Surrender of his Coppelhold.

Dodderidge. If a Coppelholder of Inheritance takes a Lease by Indenture for years, by this his Coppelhold is gone, and this is a Surrender of the Inheritance; but if he take a Lease to himself for life, there peradventure it shall be another case; But without all question, where he takes it to himself, to his Wife, and to his Son, for their lives, the Inheritance is not here surrendered and gone, but this still remains in him, and this shall be in Judgment of Law but as a Surrender to his use for his life, after to his Wife for her life, and after to the use of his Son for life; and it is a clear Case, that this shall be so, and so by this way, and by this construction, all may well stand together.

Haughton seemed something to doubt of this, whether this should be so, or not.

Nota, That the Jury upon this direction of the Court, being ready at the Bar to give a general Verdict at large, whereas the Plaintiff thought they would have found the matter specially; and for this cause the Plaintiff (having some notice which way the Jury intended to go in their Verdict) being called, he became non-suited.

The Plaintiff  
Non-Suited.



## Rice Plaintiff against Wiseman Defendant.

An Action of  
Covenant.

1 Ro. Rep. 259.  
2 Ro. Abr. 60.

**I**n an Action of Covenant, the Case appeared to be this, (S.) The Defendant having a Warren in a Park, called Braddock Park, demised Warrennam suam, Anglice, the game of Conies unto the Plaintiff, and did Covenant, that he should enjoy the benefit of his Demise; for breach of Covenant, the Action brought, and lays the breach, in killing of the Conies in the Park, libi dimissit: and also for his not suffering of him to come there, and to kill the Conies to him demised, Quia ipsum intrare, & venare non permitit.

Coke Chief Justice. If I have Warren in my Land, and I demise my Warren in such a place, clearly the soil doth pass: If the soil be in him by a Grant, or Lease of the Park, the soil doth pass.

Dodderidge Justice. A man may have a Warren in another mans Land, and there by the Grant of the Warren, the soil doth not pass.

Coke. 33 H. 6. If one grants his Warren, excepting the soil, the same doth not pass, and therefore it followeth, That if it had not been accepted, the same would have passed.

Dodderidge. I cannot have a Park in another mans Land: If I grant unto one my Manor of Dale, Manerium de Dale; Anglice, my Close in Dale, the Manor shall pass; so here in this Case, the Warren doth pass: Also a man, (as here in this Case) may have a Warren in his Park; by his demise of the Warren in his Park, the soil doth not pass.

Coke agreed with him herein, because he is here to have the Park himself, otherwise it were if he had no Park.

The Court all agreed in this, that the Warren here demised, is to be intended to be in the whole Park, and this to be as large and broad as the Park, and that here is a good breach of Covenant assigned; and so by the Rule of the Court, Judgment was entered for the Plaintiff.

Judgment  
given for the  
Plaintiff.

## Cuddington Plaintiff against Wilkin Defendant.

Entred Trinity 13 Jac. B. R.  
Rot. 683.

2 Cro. 377.  
1 Ro. Rep. 259.

**I**n an Action of Trespass, for debusing and breaking of his Close, 44 Eliz. In the Declaration it was laid to be done, tam contra pacem Domine Regine, quam contra pacem Regis nunc, a Verdict being found for the Plaintiff: It was moved in Arrest of Judgment, that the Declaration was not good, being laid to be done contra pacem Regis nunc, which cannot be so.

Coke Chief Justice. Declarations are aided by no Statute: These Words here, (S.) contra pacem Domini Regis nunc, are but surplusage; the difference in this Case will be this, if the Trespass be laid to be done in the time of Queen Eliz. and with a continuando in the time Regis nunc, there he ought to lay in his Declaration, the same to be done contra pacem of both, (S.) Domine Regine, & Regis nunc; otherwise it is clearly, where the Trespass is only laid to be in the time of Queen Eliz. there the Declaration is only to be contra pacem Domine Regine, (& Regis nunc) this is but matter of surplusage, and shall not vitiate the Declaration.

The

The whole Court agreed with him herein, and that this was a probable exception, but such surplusages are not material, being aided: And so by the Rule of the Court, Judgment was entered for the Plaintiff.

Judgment given for the Plaintiff.

*Helley Plaintiff against Hender Defendant.*

**I**n an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was found for the Plaintiff.

An Action upon the Case for words.

It was moved in Arrest of Judgment, that the words were not actionable: The Case appeared to be this.

It was laid in the Declaration, Cum quidam malefactores ignoti, had feloniously shorn the Sheep of one Henry Clemens; upon communication had between Margery Hender the Defendant, and another, as touching the sheering of these Sheep, prædicta Margeria Hender, did then speak these slanderous words, (S.) I do know who did shear the Sheep, (Prædicti Henrici Clemens innuendo) the other to whom she spake, then demanded of her who this was; unto this she answered, that it was Helley and Michel that did shear them (innuendo Felonice.)

It was urged, that these words are not Actionable, for that general words shall not be restrained to particular, and that the Innuendo will not help this, as appears, Coke 4 pars, fol. 17. Jearns & Rutlechs Case, & fol. 20. in Barhams Case.

Coke 4 pars, fol. 17. &c.

Croke Justice. Take all the words here together, and they are scandalous, and well Actionable.

Dodderidge Justice. She said, I do know who did shear the Sheep, Quid inde? Nil.

Haughton Justice. It is well here laid, that certain Malefactores had feloniously shorn the Sheep: But afterwards he comes too short, saying in his Declaration, that there was communication between the Defendant and another, concerning the sheering of the said Sheep (but not concerning the Felony) and they might speak of the sheering of the Sheep, and not of the Felony; and it is not here laid, that she said, she did know who did shear the Sheep feloniously, but that she did know who did shear the Sheep generally.

Dodderidge. This speech and communication, as it is here laid, is touching a general sheering of the Sheep, and not of a special and felonious sheering; for if one saith, the Sheep of such a one were feloniously shorn; if the other saith, I know who did shear them, and names him, this is no scandal, nor are the words actionable.

Croke. If one complains, saying, My Sheep are feloniously shorn: He to whom he complains, saith, I know who shorn them, and names him, (S.) such a one, is not this scandalous? clearly it is.

Dodderidge. The scandal here grows out of an inference, and this ought not to be so, to make words to be actionable but the words ought to be directly scandalous; if the words had been, I do know who did it, this refers directly to the Felony before alleged to be done.

Croke. If one complains, saying, My Sheep were feloniously stolen away; another to whom he did speak, saith to him, I know who took them, and names him, Is not this scandalous?

Dodderidge. These words are not actionable, for nothing is said of the Felony.

Croke. This is a direct answer to the complaint made unto him; and so in the principal case here, the words are scandalous, and so actionable.

The better opinion of the Court against this Plaintiff. Dodderidge & Haughton, Clearly they are not Actionable, they being only a scandal by an inference, and so by the Rule of the Court, the matter to stay, till the Plaintiff moved the same again; which was never moved by him afterwards, perceiving the better opinion of the Court to be against him.

*William Hanmer* Plaintiff, against *Thomas Clive* Defendant.

Entred Termin. Mich. 12 Jac. B. R.

Rott. 612.

Error.

**I**s a Writ of Error, to reverse a Judgment given against him, in the C. B. for Tho. Clive, in an Action of Debt for 260 l. The Case appeared to be this; It was shewed, that in the first Declaration there, William Hanmer, Summonitus fuit ad respondendum Thomae Clive, quod reddat ei, 260 l. Hanmer afterwards pleads to this, and hath an Emparance granted him. Afterwards, in another Term, upon a second Declaration, Wil. Hanmer, Summonitus fuit ad respondendum Thom. Clive, quod reddat ei, &c. Et le Judgment fuit done upon this second Declaration, for the said Thom. Elmes, whereas his true name was Thomas Clive, and so a variante from the first Declaration.

1. Declaration in C. B. entred. Hil. 10 Jac. C. B. Rot. 2636.  
2. Declaration &c.

Nota, That there were two Declarations in the C. B. the first was entred, Hillar. 10 Jac. C. B. Rot. 2636. The second Declaration in the C. B. was entred, Pasch. 11 Jac. C. B. Rot. 1536. and the Declaration here in B. R. was entred, Mich. 12 Jac. B. R. Rot. 612. Hutton Serjeant, The Judgment was given upon the second Declaration, and also upon default. The Error assigned to reverse this Judgment was, for that the same was given for another person, and not for the Plaintiff in the suite; The Judgment upon the second Declaration, varying from the name, in the first Declaration, for that the Plea role ought to agree with the Declaration, both in the matter, and also in the person. But here the same varies in the person from the first Declaration, and so shall it also be, if it vary in the matter. It must be agreed, that if he had been named right, in any place in the second Declaration, that this is good, and shall be amended, according to the first Declaration, but it is not so here. This is a material Error, and so this purpose, there was a Case in this Court resolved directly in point, which was.

Term. Pasch. 37 Eliz. B. R. Rot. 85. &c.

Termin. Pasch. 37 Eliz. B. R. Rot. 85. between Warner and Wincher, in debt, upon a Bond. In the first Declaration, he declared upon a Bond, dated 1. May, after an Emparance in another Term; in the second Declaration, he declared upon a Bond, dated 2. die Maij. Judgment was given in the C. B. upon the second Declaration, upon this a Writ of Error was here brought, and assigned for Error, this variance in matter; and the Judgment for this Cause resolved here to be erroneous, and for this Error was reversed. And so in this Case here; The first Declaration being for Tho. Clive against Wil. Hanmer. And the second Declaration was Thomas Elmes against William Hanmer, and so a material variance in the person of the Plaintiff, there the first Declaration, being the chief Declaration.

It was urged for the Defendant; that if this be true, that the second Declaration, upon which the Judgment was given, varies from the first Declaration, yet this shall be amended, according to the first Declaration, and so made to agree with it, and this



this is the usual course, and that this is so, will be warranted by very many Presidents.

Dodderidge Justice. In the C. B. there may be two several Declarations, the one by Tho. Clive, against Hanmer, and the other by Tho. Elmes against Hanmer, and here it may be so, that you have removed the wrong Record.

But as to this, the Council of both parties made answer, and did agree, that this was not so; but that this was, in one and the same suite; and between one and the same person, and they also agreed this variance to be so, between the second and the first Declaration.

Dodderidge. If it be so, the first Declaration is the true Declaration there, and this is right; And if the second Declaration do vary from this, I have known this to be amended here in this Court, and the second Declaration made to agree with the first. This matter is also amendable there in the C. B. according to the first Declaration.

And so without any further debate at this time, by the Rule of the Court, this was adjourned over to another time, and in the interim, to have search made for presidents in this Case; and also they to have one of the Prothonotaries of the same Court of C. B. to certify this Court, of their usage, in such Cases.

Afterwards at another time, this matter was moved again, and then the Court was informed, that upon examination of the Records, the original Record, was throughout right, and also, that all the Records in the C. B. in the proceedings in this Case, are in every particular right. But the Record here removed, doth not agree with the other, but vary in this (S) being (Elmes) for (Clive.)

The Court then answered, that they would have this searched out, this being a great abuse to the Court. It appeared upon search made, That the Record certified was right, but the entering it here in this Court, was not right, the same being inserted, and made (Elmes) for (Clive.)

This appearing to be so. The Court was therefore moved, to have the Judgment affirmed, both the Records below being right.

Dodderidge. This is but a misentering of the Clerk here, and so the same ought to be amended.

And so the Rule of the Court was to have the Record here amended; and this being done, by the Rule of the Court, the Judgment given in the C. B. to be affirmed.

The Record amended, and Judgment affirmed.

*Hall Plaintiff, against Hemminge.  
Defendant.*

Entred Termin. Trin. 13 Jac. B. R.  
Rot. 336.

**I**n an Action upon the Case for a promise; upon Non assumpsit pleaded, a Verdict was found for the Plaintiff.

Coventry. For the Defendant moved the Court in Arrest of Judgment, that the Declaration here is not good, and upon this the Case appeared to be. That upon the delivery of two Weyes of Farley, by the Plaintiff to the Defendant (one Wey of Farley in Worcestershire being six Quarters) the Defendant did then assume and promise to give unto him so much for a Wey, as any other should give unto him, for the residue, which he should sell unto them; he sets forth in his Declaration,

An Action upon the case for a promise:

2 Cro. 432.  
1 Ro. R. 285.  
314.  
1 Ro. Abr. 463.  
Hob. 51.

Trin. 12 Jac.  
B.R. Rot. 1758.  
Twist & Homes  
case.

tion, that he delivered unto him two *Weyes* of Barley, and also fers forth, that he sold the other *Weyes* to others, for so much a *Wey*, and that so the two *Weyes* by him sold, and delivered to the Defendant (deducting 1 d. in a *Wey*, according to his promise, amounted in toto unto 17 l. 12 s. the which (licet *apud requisitus*) he hath not paid, unde &c. It was urged, that this Declaration here, is not good, for that he ought therein to have shewed, that he sold the other *Weyes*, to, &c. for so much, and that he gave notice of this, to the Defendant, for how much a *Wey*, he sold the rest, and so to have requested payment thereof, and he ought also to have shewed, the certain time of his request made, this being upon a sale made by the Plaintiff to another. And to this purpose there was a Case, Trin. 12 Jac. B. R. Rot. 1758. between Twist and Homes. The Case was for *Woad*, and the same case in effect agreeing with the Case here, and in this case the Assumpsit was, to pay for so many loads of *Woad*, to him to be delivered, so much to pay him for every load, as he should sell the residue by the load unto others; he there shewed in the Declaration, that he sold the residue to others for so much a load, and that according to that rate, the *Woad* by him delivered to the Defendant, came to so much, the which he requested him to pay, but he refused. Unde actio, upon Non assumpsit pleaded, Verdict and Judgment was given for the Plaintiff, upon this Judgment a Writ of Error brought in the Exchequer Chamber, and the same Error there assigned, as is now here moved in arrest of Judgment (S) because he gave no notice to the Defendant, that he sold the residue of his *Woad* for so much a load, and so requested him to pay this, and for this Error, for want of notice given to the Defendant, for what he sold the residue of his *Woad* by the load. Judgment was reversed. And so upon the same reason here, because the Plaintiff in his Declaration hath laid no notice to be given by him, to the Defendant, for how much he sold his other *Weyes* of Barley, by the *Wey* unto others, nor yet any time laid of the request, for these causes the Declaration is not good, and Judgment to stay, there being no more difference between this Case and the other, but that there it was for *Woad*, and here for Corn, for *Weyes* of Barley.

Haughton Justice. He ought here to have given notice of this to the Defendant, for what he sold his other *Weyes* of Barley to others by the *Wey*, this being a private matter unto the Plaintiff; otherwise it would have been in Case of an arbitrament, and a Bond given to perform the same, there he is to take notice of it, at his peril, unless it be specially specified, that notice be given of the award to the party. And so without any more said herein at this time, by the Rule of the Court, this Case was adjourned over to another time, for the other side to answer these exceptions taken to the Declaration.

Term. Hil. 13  
Jac. B. R. this  
case moved  
again.

Afterwards (S) Termin. Hillar. 13 Jac. B. R. The Court was moved again in this Case, and the same exceptions moved again unto the Declaration.

Upon the former Case cited between Twist and Homes.

Coke Chief Justice. How shall a Taylor be paid upon a quantum meruit? this is issuable, and a Jury is to find this, no notice of this to be given. But here in this principal Case, the Plaintiff is to give notice to the Defendant, for what he sold the residue of his Barley by the *Wey*; and it is not sufficient for him here to demand the money, without giving first unto him particular notice, for what he sold the residue of his Barley for a *Wey*, before the demand by him made of his money, for the two *Weyes* delivered by him to the Defendant, this notice is to precede.

Dodderidge Justice. We have so far agreed in this before, for the point of notice to be first given to the Defendant. And so it was agreed in another Case here adjudged; where one did assume, to pay so much money upon the marriage, of such a one, and here adjudged, that before demand of the sum, he ought to give notice of the marriage.

Coke, Agreed with him, this to be so.

Haughton,

Haughton. In case of an Arbitrament, no notice to be given, because that both are parties and privies to it.

The Court all clear of opinion, that for the omission in the Declaration, of notice given unto the Defendant, for what he sold the residue of his Barley a *Wiley*; Judgment for the Defendant; the Declaration for this cause is not good, and therefore the Rule of the Court was, *quod querens nil capiat per billam.* &c.

### The KING against *Law*.

**B**y Information against him, upon the Statute of 23 Eliz. cap. 1. for the Recusancy of his Wife, in not coming to Church, by which, to forfeit 20 l. a month; the Information against him was for 240 l. which he was to forfeit for the Recusancy of his Wife, by absenting of her self from Church for so long time; upon this Information, and a Trial thereon had, It was found for the King.

Richardson Serjeant. For the Defendant moved the Court in Arrest of Judgment, for that, as he urged, this Statute doth not extend unto the Husband, to subject him to the penalty of the said Act, for the Recusancy of his Wife, he himself being conformable; and that this should be like unto Doctor Husseys Case, Coke 9 pars, fol. 71, 72. upon the Statute of Westminster 2. cap. 39. that a feme Covert should not be within that Act, for to make the Husband chargeable.

1 Ro. Rep. 233.  
Information  
upon the Statute of 23 Eliz.  
&c.

Haughton Justice. This which is now moved in Arrest of Judgment, is not worthy of any disputation, this being resolved, Coke 11 pars, fol. 56, 57. in Dr. Fosters Case, fol. 81, & 82. that a feme Covert is within the Statutes of 1 Eliz. 2. cap. 2. for the forfeiture of the 1 s. and of 23 Eliz. cap. 1. for the 20 l. forfeiture for every months absence.

Coke 9 pars.  
f. 71, 72, &c.

Coke 11 pars.  
f. 56, 57, &c.

Dodderidge Justice. In the Argument of Dr. Fosters Case, apt occasion was then given unto us, to have a review and a diligent consideration of all the Statutes made concerning Recusants; and this which is now moved in arrest of Judgment, is clearly against the Defendant; and so we all did resolve it in the Argument of Doctor Fosters Case, that the Husband was liable unto the penalty of 23 Eliz. cap. 1. for the Recusancy of his Wife, notwithstanding that he himself be no Recusant.

And so by the whole Court, this Exception was disallowed, and a further day then given by the Court to shew better matter, otherwise Judgment to be given for the King.

At which time Finch Serjeant moved another matter in Arrest of Judgment, upon the Statute of 23 Eliz. cap. 1. that the party ought to be convicted before.

This was also resolved against him in Dr. Fosters Case.

The whole Court now clear of opinion, that he ought to be convicted in the same suit.

Another matter was then by him moved in Arrest of Judgment, that in this Case, this was for the Recusancy of his Wife, and therefore he is not liable to the penalty in the 23 Eliz. for if a feme Covert do commit a *Wife*, the Husband shall not be liable for this; here the Husband is not made a party by 23 Eliz. and therefore he shall not pay the penalty, by the Statute of 23 Eliz. indicted: But the Statute of 35 Eliz. cap. 2. gives an Action of Debt for the penalty, and this brings the Husband in; and so for slanderous words spoken by a feme Covert, the Husband shall answer.

Stat. 35 Eliz.  
cap. 2.



Mich. 12 Jac.  
B. R. &c.

But this was all over-ruled by the Court, for that upon solemn Argument by all the Judges, Termin. Mich. 12 Jac. B. R. in an Information by William Shoyl, against Doctor Foster, entered on the Crown side; in the same Mich. Term. 12 Jac. it was adjudged against Doctor Foster: In which Case, the Arguments of all the Judges I have at large, but have not reported this Case, the same being already reported, as before.

Judgment and  
Execution for  
the King.

And so the Rule of the Court was, Quod judicium intretur pro Domino Rege, & coram Domino Rege; and also by the Rule of the Court, execution was to be awarded for the King.

### The King against Zakar, and others, Defendants.

Entred Termin. Pasch. 13 Jac. B. R. Rot. 21.  
on the Crown-side.

A Quare Impedit,  
&c.

2 Cro. 385.

Hob. 75.

1 Ro. Rep. 235.

2 Ro. Abr. 336.

346. 349.

**I**n a Quare Impedit brought against John Bishop of Norwich, Thomas Cole, and Robert Zakar, Defendants.

The Declaration grounded upon the Statute of 31 Eliz. cap. 6. of Simony; therein is set forth a Simoniacal agreement, between Thomas Cole and his Wife, and Robert Zakar, who was to be presented upon this agreement, that presently after his Presentation, he should make a Lease of part to Cole the Father, and of other part, a Lease to Cole the Son, and also to pay 60 l. to Cole the Son,

It is further set forth, that upon this, Zakar was presented unto the Vicaridge of the Church of Havering, he made the Lease accordingly to Cole the Father, and after to Cole the Son, and also paid the said 60 l. That by reason of this Simoniacal Agreement, the Church became void, and so it belonged to the King to present; and not for suffering of him to present unto this Vicaridge, the Quare Impedit brought.

And shews further, That Thomas Cole the Father, did entfeoff Thomas Cole the Son of the Manor of Havering, to which this Advowson of the Vicaridge did appertain, and that he presented Zakar.

The Declaration sets forth the Statute of 31 Eliz. cap. 6. for Simony: By which such Presentation, Admission, Institution, and Induction, should be utterly void, frustrate, and of no effect in Law; and that it should be lawful for the Queen, her Heirs and Successors, to present to the same Benefice for this time only; and that every person who shall give or take contrary to the Statute, shall forfeit double the value of one years profit of such Benefice; and that the person so corruptly taking, or procuring, &c. such Benefice, shall be upon this, and for ever after, adjudged a disabled person in Law, to have and enjoy the same Benefice.

It is also set forth, That the Vicaridge of Havering, is, and hath, Curam animarum; there is also set forth the Lease made to Cole the Father of some things, and to Cole the Son of others, and the payment of the 60 l. to Cole the Son; and that upon this, the King had good title to present, &c. and for the disturbance the Quare Impedit brought.

As to this, the Bishop he pleads, that he claims nothing but as Ordinary. And so Judgment given against him for the King.

Tho. Cole pleads, Non disturbavit, and so at issue upon this.

Zakar, he pleads, That long time before, John Smith had any thing in the said Manor of Havering, Queen Eliz. was seized of the Rectory of Havering impropriate,

estate, to which this Advowson of the Vicaridge did appertain; and this being void, John Smith, Usurpando, did present unto it, and that after this manner, to which this Vicaridge supposed to be appendant, did descend and come unto George Smith, who did of this manner enfeoffe Tho. Cole the Father, who of this enfeoffed Thomas Cole the Son, and died. That Tho. Cole presented Robert Sakar, bona fide, usurpando, upon the King, to whom this descended from Queen Eliz. who was admitted and instituted. And then the King, ad Ecclesiam vacantem, did present the same Sakar. And takes a Traverse, absque hoc, that this did appertain unto the Rectory. And upon this the Kings Attorney General demurred in Law.

Thomas Crew. That Judgment ought to be given for the King.

The first point here considerable is, where the King hath grounded his Quare Impedit, and thereby intituled himself upon the Statute of 31 Eliz. cap. 6. for Simony; this is the most material thing to have been traversed, to which there is here no answer at all given, and so in this he hath failed.

21 E. 4. fol. 1. That the cause of Action is traversable.

Also where two matters are alledged for the King, there the most material ought to be traversed. With this agræ, 10 H. 7. fol. 27. by Keble, 20 E. 4. fol. 14. 9 E. 4. fol. 39. by Danby, all agræ in this, that the most material thing is always to be traversed; and so is 22 H. 6. fol. 25. in Denham's Case, where the barrain Presentment was traversable; Here in this Case the appendancy is not traversable, but the Simony, as the most material thing, and so is Coke 5. pars. 98. in the Countess of Northumberland's Case.

2. The second point. Whether here be not a sufficient title set forth for the King by the Simony. The Defendant here hath shewed another title for him; for he hath shewed that N. Eliz. was seised of the Rectory of Havering, and that Smith did Present by usurpation upon the Queen, and sets forth a descent unto Cole, that after the death of Fairecloth, the Incumbent of Smith, Coke presented Sakar, usurpando upon the King; so here he hath made a plenarty against the King by usurpation; but yet the King may have a Quare Impedit, as appears in Green's Case, Coke 6. pars. fol. 29. in the War he shews, that Smith did usurp upon Queen Eliz. (being seised in jure Coronæ of the Rectory, and did present Fairecloth, and after made a Feoffment in Fee of the Manor unto Cole. It appeareth by 12 H. 7. fol. 12. Fitz. Nat. Bre. fol. 28. and 9 H. 7. fol. 9. b. That where a Title appears for the King in a Quare Impedit, a Writ to the Bishop shall there be granted for the King.

3. The third point; One is presented by Simony, the same person afterwards obtains a Presentation from the King, this is not good, for that he is now a disabled person to take this Benefice; he hath a Leprosie upon him, by the Statute of 31 Eliz. cap. 6. like unto that of Gehazi.

Coke Chief Justice. Notwithstanding the King saith so, that the said Incumbent shall still continue, yet the King shall have the next Presentation.

1. As to the first Point, it was urged for the Defendant, that the appendancy, and not the Simony, is here to be traversed. It must be agræd, that the cause of Action ought always to be traversed, here in the Declaration is set forth the person and Presentation of John Smith, the appendancy and the Simony.

Where the Plaintiff and the Defendant do agræ in the person presented, by which the Plaintiff makes title to himself by appendancy; here this ought to be traversed. But if they do vary in the person presented, and in the Presentment, here the appendancy is not to be traversed; Here they agræ in the person presented, and the appendancy is the Kings Title, 17 E. 3. fol. 10. 11. the King brings a Quare Impedit, there the title of the King is by the Presentment, and this is traversable. But here the appendancy is the Kings title. The King is not here intituled by the

Points.

1.

21 E. fol. 1.

10 H. 7. fol. 27.

20 E. 4. f. 14.

9, &amp;c.

2.

Coke 9 pars.

fol. 29. in

Green's Case.

12 H. 7. f. 12.

9 H. 7. f. 9.

6 Fitz. Nat.

Bre. f. 28.

17 E. 3 fol 10.

11.

Statute

Statute of 31 Eliz. because there is an inheritance in the King, but by the Statute of 31 Eliz. the King is intitled only for one turn. It is put for a Rule in Greens Case before remembred, that if one presents Simoniac to a Church of the Kings, and the King afterwards presents, jure Simoniaci, this is a void Presentment, because he hath mistaken his Title, but he ought to present jure Patronatus, not ratione Simoniaci Presentatus, the Presentment is to be traversed, where the same is denied.

2.  
Coke 6 pars,  
fol. 48. Bos-  
wells Case.

2. As to the second Point, being touching the superintention, this is not material. Coke 6 pars, fol. 48. in Boswells Case, if one usurp upon the King, by this he gains a Presentation upon the King, but no Patronage. He is not to be removed by Action, but by a Quare Impedit, as appeareth by 9 E. 3. fol. 20. new print, and fol. 660. old print. If the King do ratifie the possession of the Incumbent, ita quod in nullo gravetur, this is now as a new Presentment.

Four things in  
the Stat. of  
31 Eliz.

3. As to the third Point, (S) the disability of the person by the Statute of 31 Eliz. 4. matters are to be observed upon this Statute. (S)

1. The Presentation to be void.
2. The King to have this Presentment.
3. A Fine to be imposed by way of forfeiture; and
4. The party presented, to be utterly disabled.

Stat. of 13  
Eliz. cap. 12.

It must be agreed, to be a disability as to the party, but whether he shall be disabled as to the King himself, this is a Point here considerable; as to this it is to be considered, whether the King may not enable him to take this Benefice: By the Statute of 13 Eliz. cap. 12. a Presentment of an Infant to a Benefice is void. But if the King will dispence with this, it is good; if the King may do this, the Court to judge of this, no authority being in it.

27 H. fol. 26.  
Tatams Case,  
30 E. 3. f. 9.

As to a Contract made with a feme Covert, this is good by 27 H. 8. fol. 26. in Tatams Case, and it shall be said to be the Contract of the Husband, 30 E. 3. fol. 9. a sale by a feme Covert is good, and he shall declare that he himself sold this.

As to the Declaration, It was urged that this is not good. For that no Quare Impedit is to be brought, but a Presentation ought to be alledged. Here it is, because he did not suffer him to Present Ecclesia de Havering.

Whereas it ought to have been ad eandem vicariam, for here is both Ecclesia & vicaria.

Doderidge Justice demanded, Quid if the Parsonage be presentable.

Coke Chief Justice. Omnis vicaria est Ecclesia, this is clear, and also verba generalia, generaliter sunt intelligenda.

Stat 31 Eliz.

As to the Statute here of 31 Eliz. cap. 6. One Presents by usurpation upon the King, he Presents him again, this is void if he do not recite this, and so have him first to be removed; as it was held in Dallingtons Case. The King hath a Tenant for years, if he makes a lease for life, this is void if he do not recite the lease for years. If one Presents upon the King, this Presentee ought to be removed. In the Bishop of Winchesters Case, 2 pars, fol. 43. if the right of an Abbot comes to the King, this shall not pass out of him, unless it pass by special words, and not by a Release. An Advowson shall not be drawn out of the King, and this was Salts Case.

Dallingtons  
Case.  
Coke 2 pars,  
f. 43. &c. Salts  
Case.

As to the matter here of Simony, if there be fraud in the Incumbent, or if money be given for the Presentation, though it be unknown to the Incumbent, to this let the Patron look. The Incumbent shall be removed. As to the disability of the person.

It was the Case concerning the Cofferers place, an old Judge had this place heretofore, being a place of very great confidence, 40000 l. per annum passeth through his hands. One did lately contract with, &c. and for to have this Office. And it



it was questioned, whether this was within the Statute of 5 E. 6. capite 16. for buying of Offices. Stat. of 5 E. 6. cap. 16.

And it was Sir Arthur Ingram's Case. In which Case the Judges were all demanded their opinions (notwithstanding his Wife there paid the money,) this Statute clearly doth disable such a person for ever to have the said Office, for the which he had so contracted. So that as to the Cofferers place, we all did Resolve that Sir Arthur Ingram was by the Statute disabled for ever to be made Cofferer, because he would have bought this place, and we also resolved, That the King was bound by this Statute. Sir Arthur Ingram's Case.

Doderidge Justice. There is Simoniacus, & Simoniace promotus, or institutus, as was Resolved in Calverts Case, Termino Pasch. 9 Jac. in Scaccario, a good Case as touching this matter. Pasch. 9 Jac. Calverts Case, in Scaccario.

The whole Court agreed clearly in this, without any further Argument, that this Person here presented by Simony; the Presentation is merely void, and that the party so presented, is utterly disabled for ever, by the Statute of 31 Eliz. cap. 6. to take the same Benefice, to the which he was thus presented by Simony, and that he is incapable to have another Presentation to the same Benefice; and therefore the Rule of the Court was, Quod judicium intretur pro Domino Rege, unless cause be shewed by a time given. Judgment for the King, Nisi causa in contrarium.

Afterwards this Case was moved again, and George Croke moved the Court to stay Judgment. That the Demurrer might be waived, and to go to trial upon the Simony.

The whole Court denied this.

Then he moved exceptions to the Record to stay Judgment. 1. That there is a mistaking in the reciting of the Statute (as Regardus for Rewardus,) this not good, this is warranted by the Lord Cromwells Case, Coke 2 pars. fol. 69. touching recitals and misrecitals, and for this cause, the Declaration is not good, The first Clause of the Statute being, If any one for any sum of money or reward. Coke 2 pars. fol. 69. the Lord Cromwells case.

Coke Chief Justice, cum omnibus regardis; this is the common form in all Warrants, if it had not been in a general Statute, this is but only matter of form, Regardus is an old French word: In Cromwells Case there it is Nuntius for Mendacius. These exceptions taken are but minutæ decimæ, by 5 R. 2. Title Quare Impedit, A Vicaridge may well be appendant unto a Parson. 5 R. 2. tit. Quare Impedit.

The Court was then moved for stay of Execution till the next Term.

The Court denied this, and so the Rule of the Court was, Quod judicium intretur pro Domino Rege. But by the assent of the parties, Sakar was to continue in the Vicaridge for a certain time. Judgment given for the King.

Afterwards (S) Termino Hillar. 13 Jac. this matter was moved again. Sakar by assent of parties being to continue for a time in the Vicaridge, this time being now past, and he still continuing in possession, and committing of great waste, (S) by pulling down of Glasse windows, and pulling up of Planks, the Court was therefore moved to have a speedy time given him to remove; and also for an Attachment against him for this his Contempt. Termin. Hill. 13 Jac. B. R. &c. Mo. 917. n. 1303. 2 Ro. Abr. 813. V. 2 Bul. 150.

Coke Chief Justice. We cannot grant this, because that after Judgment here by us given against him, this his staying in possession was by assent of the parties, but not by the Rule of the Court, for if it had been so, then there had been a good ground for an Attachment; you may have a vi Laica removenda, but not in this Case here, because he is a Parson. But you may have your remedy by way of Inhibition of forcible entry, or by an Ejectione firmæ. But here you may have a Prohibition, and this you may have, not only for the Patron, but also for any for the second Incumbent, for this is the Kings Writ; and any one may have a Prohibition for the King. Also here, this is the Power of the Church, and we will here pro-

A Prohibition  
granted, to  
wast.

Term. Pasch.  
14 Jac. B. R.  
this Case mo-  
ved again.

Fitz. Nat.  
Brev. Regis.

Hill. 38 Eliz.  
in Robinsons  
Case.

Stat. of 5 Eliz.  
cap. 23.

The Judg-  
ment of the  
Court against  
Sakar.

hibite them, if they fall and wast the timber of the Church or if they pull down the houses; And therefore by the Rule of the Court in this Case a Prohibition was granted to stay the doing of any wast.

Afterwards this Case of Sakar was moved (S) Termin. Pasch. 14 Jac. B. R. Judgment being formerly given against him for Simony; and for this to be removed, and by this to be for ever disabled to have this Benefice again.

Richardson Serjeant now moved the Court to have him restozed again, because, as he urged it, he was unlawfully removed. The reason being, that in a vi laica removenda, by which removed, by which by Fitz. Nat. Brev. and the Register, this Writ comes to remove omnem vim laicam, he shews that the Sheriff had disposseis him, and put another in, the which he ought not to do (and this he offered to make good by an Affidavit,) this is returnable by the Sheriff.

Coke Chief Justice. In this his so doing, he hath done against the Law, If he removes one and puts another in.

Richardson Serjeant cited Robinsons Case, Hilar. 38 Eliz.

Where upon an Affidavit made, that the Sheriff in a vi laica removenda, had removed one, and put another in, there this was debated, whether upon this shewed to the Court, the first man removed, should be restozed again or not; and there resolved by the whole Court, the second man to be displaced again, and the first to be restozed.

Coke. We are to judge upon a Record, and not upon Affidavits; therefore you cannot have a Certiorare, for that neither this Writ, nor the Writ, de excommunicato capiendo, are returnable by the Sheriff, until the Statute of 5 Eliz. cap. 23. If a Justice of Peace do remove a force, this is well done by him, but he cannot put another into possession, if he cannot do this upon an Indictment on the Statute of 8 H. 6. cap. 9. of Forcible Entries, we cannot do this upon an Affidavit.

The Court being then informed, that this was in the Case of Sakar, they answered, that he ought not in this Case be restozed, neither can he have any remedy, he being for ever disabled by reason of the Simony. This was so agreed by the whole Court.

*Robins Plaintiff, against Sambel  
Defendant.*

Entred Pasch. 13 Jac. B. R.  
Rot. 21.

A Writ of  
Error.  
2 Cro. 386.  
1 Ro. R. 278.  
1 Ro Abr. 771.

Coke 8 pars,  
The Princes  
Case, &c.

**I**n a Writ of Error to reverse a Judgment, given in an Inferiour Court; the Error assigned in the Judgment, this being, Ideo concessum est per Curiam, quod prædictus Johannes Sambel recuperet, whereas it ought to have been, Ideo consideratum est per Curiam quod, &c.

Glanvil. As to this, First, it is to be considered, what was the ancient word used in the entering of Judgments: As to this, in the Book of Entries, all the Entries are in this manner (S) Ideo consideratum est at large; or else, Ideo conf. *hopt*, Coke 8 pars, in the Princes Case, and in the Case of Suttons Hospital, Coke 10 pars, the Judgments are, ideo conf. other Presidents there are with concessum est, in which the Printers did mistake in writing concessum for conf.

The reason of this word (consideratum) is very significant, (S.) That the Judges were to have consideration.

Alto

Also this word doth import in it two meanings, (S) 1. This to be a granting and an award of the Court. 2. This was so done by them upon very good consideration.

Also the Law hath divers words which are appropriated, to be used to a special purpose, as the words which are called vocabula artis, as warrantizo & hoc paratus est verificare, for an averment: If instead of this, the word (probare) be used, this is not good.

Trin. 5 Jac. B. R. Rot. 228. *Seamors Case*: In a writ of Error, the Error assigned in the Judgment, being, ideo Inconcessum est, there urged, (In) to be void, and concessum good; but it was there said, that if it had been (concessum est) a question it would be, whether that were good, or not, and thought not good if it were so.

For the Judges there said, that by this, if it might be so, in time they would come to Aggretum, & concordatum est, & videtur Curie, which ought not to be suffered, and that Judgment was reversed for that and for other Errors.

Termin. Pasch. 9 Jac. B. R. In one *Fullers Case*, this matter came again to be questioned, touching the validity of this word (concessum est) and there Yelverton Justice observed, that this word (concessum) is not a word of gratuity, fit for a Judgment.

It was urged by Henry Finch for the Defendant, and agreed, that the usual course is, and so hath been, ideo consideratum est, but yet concessum est is a form of Error, and also good; and so is Coke 1 pars. in *Alton-Woods Case* for the Queen, and in *Porters Case* against the Queen, the Entry of the Judgment in both these being, ideo concessum est: The President cited in 5 Jac. Inconcessum, that not good, but reversed; and so videtur Curie, this not good.

Mich. 5 Jac. B. R. Rot. 358. *Bentrie against Barbar*, the Judgment was there entered in this manner, (S) ideo videtur Curie, this assigned for Error, and for this Error the Judgment was reversed.

Coke Chief Justice. I should be very loath to change the ancient form and course of Presidents, for the Entry of our Judgments, for that Innovations in this kind are very dangerous, and not to be suffered.

As to the Entry, (S) (videtur Curie) there is no such special Judgment: For there is a videtur Curie first, and then presently after, as a good and necessary consequent of this, ideo consideratum est per Curiam quod, &c. this being an answer to the point of the Verdict; and so in this manner, the Entry of videtur Curie is usual, and not to be reversed for this: Concessum & proviso are good words, and used in Parliaments.

As in the Statute of Marlebridge, cap. 1. where it is Provisum est, concordatum, & concessum est quod tam majores, quam minores, in Curia Domini Regis, justitiam habebant & recipient: This is good in an Act of Parliament, but not so to be in the entering of our Judgments, in the same, neither to be concessum nec concordatum, for in these Cases we ought not to go, and to respect equipollencies, but we ought still to observe the old and ancient order herein used.

Bracton observeth, That Originals are made by Parliament, and therefore they are not to be changed but by Parliament.

The observation of the manner of Entering of the old Presidents is very excellent, (S) Ideo in misericordia, can you have another word as good and significant as this, in Imprisonetur.

But of this I will be advised, and see the Presidents.

Haughton Justice. We are not to permit or give way to any new device in the entering of our Judgments.

Coke Justice. We do not dislike of the Entry, (videtur Curie) but new Inventions, novitates are most dangerous: It is not good for us to digress from the usual form of Presidents, herein we will proceed, lento pede.

Dodderidge



Dodderidge Justice. Videtur curia; concessum, & ei conceditur, all these are the award of the Court, and so used, but they ought to be so used in their proper and particular courses, where pronounced in French, as (S.) (Le Court agards) that is, the Court adjudges.

The Court then said to Hen. Finch, being for the Defendant, that it rested on his side to search for Presidents, and produce them to satisfy the Court, they inclining to be of opinion against him, upon this Error assigned.

Coke. If we shall give way to this, by allowance of this manner of entry of our Judgments, we shall not then know where to rest; and in time we shall come to this kind of entry also, (S) Concordatum, & adjudicatum est per Curiam, but these are not good: That one shall be (in misericordia) there is no other word for this, We must not give way or countenance to these new inventions, for this should be a means to introduce Barbarism.

Adjudicatum est per Curiam, this is not good; and so if an Entry be, (& sic sit in poena) for in misericordia, this is not good nor to be allowed of: The ancient forms of our Judgments are by no means to be altered, or varied from, nor yet our Originals.

The Clerks being then demanded by the Court, touching the manner and forms of entry of Judgments, made this answer, That there was no President of any such Entry, (S) ideo concessum est per Curiam; neither here in B. R. nor yet in C. B.

Dodderidge. The usages in Inferior Courts, shall not lead or direct us here: If the Entry had been, Ideo adjudicatum est per Curiam, this may be a good Entry of a Judgment here, and it is somewhat hard for to reverse a Judgment, for an improper word used in the entering of it: If it had been ideo curia sententiam dedit.

Coke. If it had been so, it would have been erroneous, for this had been a very bad form of entry of a Judgment; we are to respect Ciceronian Latine, more than our ancient forms of entry here used: If it had been Provisum est, this had not been good, no more here in this principal Case of ideo concessum est.

The whole Court agreed herein, that this was no good entry of the Judgment, and that for this Error the Judgment is erroneous; yet the reversal of the Judgment was not pronounced, but a further time given to the Defendant to search for Presidents, but none were ever after produced to satisfy the Court, neither was the same ever moved again.

Judgment erroneous, per Curiam.

### Baily Plaintiff, against Merrell Defendant.

A Special action upon the Case for a deceit.

2 Cro. 386.

1 Ro. Rep. 275

1 Ro. Abr. 97.

**I**n a Special Action upon the Case for a deceit, the Case appeared to be this: The Plaintiff being a common Carrier, using to carry Wares out of Essex into Northampton-shire; the Defendant having a Cade of Wood to be carried, came unto the Plaintiff, and bargained with him for the Carriage of this, and by agreement, he was to give him 2 s. for every hundred weight of this, and being demanded by the Plaintiff, how many hundred weight this did contain, he said it was about 800 weight; upon this, he giving credit unto him, did cause this to be put into his Carr, and he afterwards perceiving by the hardness of the draught, that his Horses did overdraw themselves, and by reason of this Carriage he did kill two of his Horses, and then he did presently weigh the same, and found the same to be 2000 l. weight, and so for this his deceit used, by reason of which he was so much damaged; for his remedy herein, he brought this Action, to which the Def. pleaded

Non

Non culp. all this matter appearing so to the Jury upon the Trial, and the loss of his Horses, they gave a Verdict for the Plaintiff, and 20 Marks damages.

Harvey Serjeant. Moved for the Defendant in Arrest of Judgment, that the Plaintiff had no cause of Action by this given unto him, because that he at his own peril ought to take notice of the weight, and he is the party who ought to weigh this, as appears by the Case in 9 E. 4. fol. 3, 4. the Case of the Fell to be new cast, 9 E. 4. f. 3, 4. where it is said, that by the Law, he which hath the skill is to do it; and so is Perkins, fol. 153. placito 786. a Taylor is to shape the Crown; here the Fargain was for him to carry this from his House in Essex to such a place: The Plaintiff in his Declaration saith, that the Defendant also affirmavit, that this did not exceed 800 weight, and that he fidem adhibens, &c. did carry the same; this is not good.

Dodderidge Justice. Here is a plain default in the Carrier, that he did not weigh this; if he had carried this home for him, he would then have had for it according to the weight of it, after the rate of 2 s. a hundred weight, as they agreed for, and that there it ought to be weighed; he himself at his peril ought to have looked unto this before.

Croke Justice. The difference will rest upon the absence and presence of the party: If one lends his Cart to another to carry a load of Wood, and that he will have for it 10 s. a load; if he overload the Cart, an Action lieth for this fraud without damage, for damage without fraud gives no cause of Action; but where these two do concur and meet together, there an Action lieth; so here these two do both concur, for here he hath dealt fraudulently, and also deceptive with him in the weight.

Dodderidge. The difference will be, if absent, and where he is present and weighs this, and so receives this into his charge, 11 E. 4. the warranty of a Servant who sells Wares, if he sells Purple to one, and saith to him that this is Scarlet, this warranty is to no purpose, for that the other may perceive this, and this gives no cause of Action to him; no more here in this Case hath the Plaintiff any cause of Action, for the Carrier ought to weigh this, because he is to have the recompence for the Carriage of it, according to the weight of it, and he ought to endeavour to know the certainty of this; but in the Case which hath been put of the Cart, one saith, Send your Cart to me to carry Wood, and I will give you so much a Load, and trust me with it; there if he overload the Cart, here is a manifest deceit, and for this an Action well lieth; otherwise it is, where the Carrier is there present, for it is then very easie for him, for to see the difference between 800 and 2000 weight.

Haughton Justice. To warrant a thing that may be perceived by sight, is not good, by 11 E. 4. but here the weight may be well perceived by the view of it; here the deceit is no parcel of the Fargain, but the matter of weight to have 2 s. for every 100 weight, and this allegation of the weight comes by the averment of the party, upon the demand of the Plaintiff, and therefore he can have no Action for this; for here the agreement is to be so much for the pack, and the surplussage of the weight is only averred, so that the Plaintiff hath no cause of Action here.

Croke: If he had laid here, that he had lent him his Cart and Horses, and that he had overloaded his Horses, by reason whereof he lost two of them, here had been a just cause of Action.

Haughton. He ought here to have weighed this.

Dodderidge. If we shall give way to this, then every Carrier would have an Action upon the Case; this belongs properly to the Carrier to weigh this, if he demands of him what the weight is, and he saith about 100 weight, and it is 1000 weight; if he will not weigh this himself, but kill his Horses with the carriage of it, he shall not have any Action for this, because it is meetly his own default that he did not weigh it.

Haughton.

Haughton. If one sells to another a Horse, and warrants him to be sound, and he is not, an Action upon the Case lieth for this: otherwise it is, where he sells the Horse generally without any such warrant, and he is not sound, no Action lieth for this, because this was no part of the Bargain, and so it is here in this Case.

Tota Curia, (absent Coke Chief Justice) that the Action by the Plaintiff lieth not, because the default was in himself, that he had not weighed this.

*Curia* against  
the Plaintiff.

By the Rule of the Court, this matter to stay till the Plaintiff move the same again, and no Judgment pronounced one way or other; but the Plaintiff perceiving the Opinion of the Court to be against him, never moved the Court again herein.

*Withers Plaintiff against Henly  
Defendant.*

An Action for  
false Imprisonment.

**I**n an Action for false Imprisonment, the Case was this; The Plaintiff being taken by the Sheriff, and in Execution at the Suit of another, and so by him delivered over to the new Sheriff in Execution; afterwards Brown, the party himself, (at whose Suit he was then in execution) came to the Sheriff, and told him, that he had made and sealed a Release of the Debt unto the Plaintiff, and that therefore he should deliver him out of execution: The Sheriff doth not so, but keeps him after this still in his Custody in Prison; upon this the party in execution (being the Plaintiff) brings his Action of false Imprisonment.

It was urged in this Case for the Defendant by Geo. Croke, That this Action here lieth not, for that the Sheriff here had no cause to deliver him, he being lawfully taken, and in execution, and the detainer now of him is only in question.

If a man be taken in execution at the Suit of the King, afterwards a Superfedeas comes to the Sheriff: By 2 H. 7. fol. 19. he may return the Superfedeas with the Body, as there he made the return of the Capias, Superfedeas, & Corpus in custodia, there held by all, that he should return this to the Court; that the Sheriff hath done well not to deliver him, he may here return, Quod ante adventum brevis, he had done Execution, and so he may return both, ea de causa, & non alia.

19 H. 6. fol. 43. placito 88. If a Capias comes to the Sheriff to take the Body of such a one, afterwards a Superfedeas is granted, that he shall not take him, Whether a false Imprisonment lieth, or not; if he had taken him, he ought then to return both together, so that the Court may adjudge upon it.

13 H. 7. fol. 1. b. where the difference is put between a Capias ad satisfaciendum, and another Capias in process: Here the Imprisonment was lawful, and so no Action lieth for this.

As to a second Point here, by a Latitat out of this Court, the Plaintiff was arrested, the Sheriff had him in execution for Debt, and so delivered to the new Sheriff: afterwards one comes to the Sheriff, and tells him, that he had released the Debt of the party, being then in execution for the same, and that therefore he might suffer him to go at large; the Sheriff answers, that he did not know this to be so, but that he would return this unto the Court: The Sheriff is an Officer of the Court, and he is not bound to believe the verbal report of any one; he ought to answer for all Escapes, and therefore though this matter was shewed unto him, yet he was not bound to discharge him.

27 H. 8. fol.  
24. b. & c.

In 27 H. 8. fol. 24. b. in Tatams Case it is there questioned, Whether he may be discharged by assent of the party, or not, being delivered to him in execution by the



the Court, and therefore he is to be discharged of this by the award of the Court, and not otherwise; the Sheriff here may and ought to answer him in this manner, (S.) I have taken him, and I will return this at the day with the Body, by 9 E. 4. fol. 3. If the Sheriff arrest one upon a Process, he ought to return this with the Body at the day to him given by the Court to do this: It is there said, If the party discharge him, this is a good excuse, for that volenti non fit injuria, here it is only for his not believing of him, but detained him in Prison after; this is no false Imprisonment, nor cause of such an Action.

Coventry for the Plaintiff prayed Judgment: The Action here is for a false Imprisonment, 11. Aprilis, 11 Jac. that a Capias issued to Arrest the Plaintiff, this came to the Sheriff out of the Exchequer, and a Latitat out of the B. R. for to take him; one Henley was Sheriff, and the Defendant his under-Sheriff: as to the Capias, he saith the Superfedeas came unto him, that if he had not taken him, that then he should not take him; and if he was taken, to let him go at large.

Obj. It hath been Objected, that the Imprisonment was lawful, and therefore the Action lieth not.

Resp. As to this, notwithstanding there was a lawful taking, yet when there was a sufficient discharge, and a detainer afterwards, this amounts in Law unto a new Imprisonment, and a tortious detainer.

As to the matter moved, Whether the Superfedeas be a good discharge of the Judgment in the Exchequer: There is a great difference between this Case here, and the Case in 2 H. 7. fol. 19. here because the Debt of the King was satisfied; this was a good discharge, being to have him delivered, if taken.

Then as to the Arrest by the Latitat out of this Court, after this, the party at whose Suit, by writing under his Hand and Seal, discharges. Withers the Plaintiff of the said Debt for which he was arrested; he came unto the Sheriff the Defendant, and said so much unto him, that he had made a Release to him of the Debt, and wished him to let him go at large; that he may discharge him, appeareth by 13 E. 3. Fitz. tit. Bar, placito 253. and by 27 H. 8. fol. 24. agreed there by all, that the party may discharge him when he is taken.

13 E. 3. Fitz.  
tit. Bar, &c.

In 10 H. 7. fol. 3. a. It is there questioned, Whether he may discharge him by Parol: but there it is put, that without any question he may discharge him by Writing when he is taken, and not in Execution; here was shewed to the Sheriff an express Discharge by writing, and also a Prayer of the party himself to discharge him.

Coke Chief Justice said unto Coventry, that he inclined to be of his Opinion, that the Action here well lieth.

By the Statute of 1 R. 2. cap. 12. one being in Execution, shall not be suffered to go out of Prison by Mainprize, Bail, or by Ransom, without making gree to the parties, unless it be by Writ, or other Commandment of the King: If a Writ of discharge be lawful, then to keep him afterwards will be a false Imprisonment, he is not to stay till he return this: If he be discharged of the matter for which he is taken, he is then to be put out and set at liberty, and the detaining of him after this, amounts in Law unto a new taking, for the restraining one of his liberty, where he ought to have it, is a Captivity in Law; here the Sheriff ought to take notice of the party Plaintiff, and also at whose Suit he is in his Custody.

Stat. of 1 R.  
cap. 12.

The liberty of a man is a thing very precious in the Law; here was a good discharge shewed unto the Defendant, and he ought not after this to have kept him any longer in Prison, and therefore for this the Action well lieth.

Haughton Justice. The Superfedeas is not to be denied, he ought to obey this though erroneous; the Sheriff in case of discharge of the party, if he do believe this, he is charged with a third matter, (S.) to have the Body in Court.

Coke. This is only ad respondendum, and if the party do discharge him before, this then ought not to be done.

Haughton. If one sells to another a Horse, and warrants him to be sound, and he is not, an Action upon the Case lieth for this: otherwise it is, where he sells the Horse generally without any such warrant, and he is not sound, no Action lieth for this, because this was no part of the Bargain, and so it is here in this Case.

Tota Curia, (absent Coke Chief Justice) that the Action by the Plaintiff lieth not, because the default was in himself, that he had not weighed this.

*Curia against the Plaintiff.*

By the Rule of the Court, this matter to stay till the Plaintiff move the same again, and no Judgment pronounced one way or other; but the Plaintiff persisting the Opinion of the Court to be against him, never moved the Court again herein.

*Withers Plaintiff against Henly Defendant.*

*An Action for false Imprisonment.*

**I**n an Action for false Imprisonment, the Case was this; The Plaintiff being taken by the Sheriff, and in Execution at the Suit of another, and so by him delivered over to the new Sheriff in Execution; afterwards Brown, the party himself, (at whose Suit he was then in execution) came to the Sheriff, and told him, that he had made and sealed a Release of the Debt unto the Plaintiff, and that therefore he should deliver him out of execution: The Sheriff doth not so, but keeps him after this still in his Custody in Prison; upon this the party in execution (being the Plaintiff) brings his Action of false Imprisonment.

It was urged in this Case for the Defendant by Geo. Croke, That this Action here lieth not, for that the Sheriff here had no cause to deliver him, he being lawfully taken, and in execution, and the detainer now of him is only in question.

If a man be taken in execution at the Suit of the King, afterwards a Superfedeas comes to the Sheriff: By 2 H. 7. fol. 19. he may return the Superfedeas with the Body, as there he made the return of the Capias, Superfedeas, & Corpus in custodia, there held by all, that he should return this to the Court; that the Sheriff hath done well not to deliver him, he may here return, Quod ante adventum brevis, he had done Execution, and so he may return both, ea de causa, & non alia.

19 H. 6. fol. 43. placito 88. If a Capias comes to the Sheriff to take the Body of such a one, afterwards a Superfedeas is granted, that he shall not take him, Whether a false Imprisonment lieth, or not; if he had taken him, he ought then to return both together, so that the Court may adjudge upon it.

13 H. 7. fol. 1. b. where the difference is put between a Capias ad satisfaciendum, and another Capias in process: Here the Imprisonment was lawful, and so no Action lieth for this.

As to a second Point here, by a Latitat out of this Court, the Plaintiff was arrested, the Sheriff had him in execution for Debt, and so delivered to the new Sheriff: afterwards one comes to the Sheriff, and tells him, that he had released the Debt of the party, being then in execution for the same, and that therefore he might suffer him to go at large; the Sheriff answers, that he did not know this to be so, but that he would return this unto the Court: The Sheriff is an Officer of the Court, and he is not bound to believe the verbal report of any one; he ought to answer for all Escapes, and therefore though this matter was shewed unto him, yet he was not bound to discharge him.

27 H. 8. fol. 24. b. &c.

In 27 H. 8. fol. 24. b. in Tatams Case it is there questioned, Whether he may be discharged by assent of the party, or not, being delivered to him in execution by the

the Court, and therefore he is to be discharged of this by the award of the Court, and not otherwise; the Sheriff here may and ought to answer him in this manner, (S.) I have taken him, and I will return this at the day with the Body, by 9 E. 4. fol. 3. If the Sheriff arrest one upon a Process, he ought to return this with the Body at the day to him given by the Court to do this: It is there said, If the party discharge him, this is a good excuse, for that volenti non fit injuria, here it is only for his not believing of him, but detained him in Prison after; this is no false Imprisonment, nor cause of such an Action.

Coventry for the Plaintiff prayed Judgment: The Action here is for a false Imprisonment, 11. Aprilis, 11 Jac. that a Capias issued to Arrest the Plaintiff, this came to the Sheriff out of the Exchequer, and a Latitat out of the B. R. for to take him; one Henley was Sheriff, and the Defendant his under-Sheriff: as to the Capias, he saith the Superfedeas came unto him, that if he had not taken him, that then he should not take him; and if he was taken, to let him go at large.

Obj. It hath been Objected, that the Imprisonment was lawful, and therefore the Action lieth not.

Resp. As to this, notwithstanding there was a lawful taking, yet when there was a sufficient discharge, and a detainer afterwards, this amounts in Law unto a new Imprisonment, and a tortious detainer.

As to the matter moved, Whether the Superfedeas be a good discharge of the Judgment in the Exchequer: There is a great difference between this Case here, and the Case in 2 H. 7. fol. 19. here because the Debt of the King was satisfied; this was a good discharge, being to have him delivered, if taken.

Then as to the Arrest by the Latitat out of this Court, after this, the party at whose Suit, by writing under his Hand and Seal, discharges Withers the Plaintiff of the said Debt for which he was arrested; he came unto the Sheriff the Defendant, and said so much unto him, that he had made a Release to him of the Debt, and wished him to let him go at large; that he may discharge him, appeareth by 13 E. 3. Fitz. tit. Bar, placito 253. and by 27 H. 8. fol. 24. agreed there by all, that the party may discharge him when he is taken.

13 E. 3. Fitz.  
tit. Bar, &c.

In 10 H. 7. fol. 3. a. It is there questioned, Whether he may discharge him by Parol: but there it is put, that without any question he may discharge him by Writing when he is taken, and not in Execution; here was shewed to the Sheriff an express Discharge by writing, and also a Prayer of the party himself to discharge him.

Coke Chief Justice said unto Coventry, that he inclined to be of his Opinion, that the Action here well lieth.

By the Statute of 1 R. 2. cap. 12. one being in Execution, shall not be suffered to go out of Prison by Mainprize, Bail, or by Ransom, without making gree to the parties, unless it be by Writ, or other Commandment of the King: If a Writ of discharge be lawful, then to keep him afterwards will be a false Imprisonment, he is not to stay till he return this: If he be discharged of the matter for which he is taken, he is then to be put out and set at liberty, and the detaining of him after this, amounts in Law unto a new taking, for the restraining one of his liberty, where he ought to have it, is a Captio in Law; here the Sheriff ought to take notice of the party Plaintiff, and also at whose Suit he is in his Custody.

Stat. of 1 R.  
cap. 12.

The liberty of a man is a thing very precious in the Law; here was a good discharge shewed unto the Defendant, and he ought not after this to have kept him any longer in Prison, and therefore for this the Action well lieth.

Haughton Justice. The Superfedeas is not to be denied, he ought to obey this though erroneous; the Sheriff in case of discharge of the party, if he do believe this, he is charged with a third matter, (S.) to have the Body in Court.

Coke. This is only ad respondendum, and if the party do discharge him before, this then ought not to be done.



Dodderidge Justice. If the party will, he may then well discharge him; and upon this, he is to be set at liberty.

49 E. 3.

Coke. One being in Execution, the Plaintiff comes, and says to the Sheriff, set him at large out of prison, if he will detain him afterwards in prison but by the space of an hour, an action for false Imprisonment will well lie against him for this. The Statute of 1 R. 2. saith, Nisi gree soit fait al partie. Also interest Reipublice ut sit finis litium, and shall it be in the power of a Sheriff to detain one in Prison, after such a lawful discharge made by the party himself, at whose suit he was imprisoned? this shall in no wise be, by 49 E. 3. a continuance of an Inclosure is a new Nuisance. If one comes into the house of another to eat and to drink, or for any other lawful matter; and he detains him there in his house, for this an Action of Faur Imprisonment well lieth, by 21 E. 4. a Sheriff shall not take any advantage of an Error, for he ought not to argue the Authority of the Court.

Dodderidge & Croke agreed with him herein.

Coke. Every restraint of Liberty implies a taking in Law. If the Sheriff doth arrest one, or keeps one in Prison at the suit of another, he ought at his peril to take notice of the Plaintiff or Party at whose suit he is in his custody. This here is a very clear and a plain Case, if he would have helped himself here, he ought to have set forth, that he knew him not to be the Plaintiff, who told him of the release; but he hath not so done, and so it is clear against him.

Judgment for the Plaintiff.

The whole Court agreed with him, that the Plaintiff here had good cause to have this Action of Faur Imprisonment. And so the Rule of the Court was; Quod judicium intretur pro querente.

*Blamford Plaintiff, against Blamford.*  
Defendant.

Entred Termin. Trin. 8 Jac. B. R.  
Rot. 1671.

Action of  
Trespass.

1 Ro. Rep. 318.

Godb. 266.

Cro. Jac. 394.

Mo. 446.

**T**homas Blamford an Infant, by Henry Blamford his Guardian by Will, brought an Action of Trespass against Laurence Blamford for entering into and breaking of his Close, for treading, spoiling, and consuming of his Grasse, and this laid with a Continuance, till the bringing of the Action ad damnum 10 l. upon Non culp. pleaded, this came to a trial at the Assizes in Wiltshire, and the Jury there found a special Verdict to this effect. They find that long time before the trespass, one Thomas Blamford the Grandfather 40 Eliz. was possessed of a Tenement called Gowens, of which the Close where the trespass was done called East-hayes was parcel, which term was for 32 years then to come; and that he being so possessed, made his last Will and Testament. The which the Jury finds in hæc verba. Item, I give to Alice my Wife my Living called Gowens. Ita quod, she do not sell it: but she to have this for her life only, and not otherwise, nor any longer. And after her death, I devise the same to Thomas and Laurence my Sons, equally and jointly, if they have no Sons. And if it shall please God to send them, or either of them any Men-children; Then my Will is, that shall be reserved and put out for the benefit and behoof of such Child or Children. But if it shall please God to send them no Men-children, then my Will is, that after their decease, it shall descend and come to two of Henry Blamfords Sons (S) Robert and Stephen.

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The Jury find that he made Alice his Wife and Thomas his eldest Son his Executors, and after died (S) 1. Martij 43 Eliz. being then possessed of the same term, and that after his death they proved the Will, &c. And that Alice did enter, enclaining the same as a Legatee, and not as Executor, and that afterwards she died, being thereof so possessed; and that Thomas and Laurence did enter, and enjoyed the same for three years without any issue Male. And that afterwards Thomas the Executor had Issue Thomas (the now Plaintiff,) who entered upon the Possession of Laurence (the now Defendant,) who 26. Aprilis did enter and break the Close pro ut, &c. upon whom Thomas the Plaintiff did re-enter, &c. And so the Jury did say, that if the Entry of Laurence shall be adjudged lawful, then they do find him Non culp. but if otherwise, then they find him culp. and assess damages, ad &c.

The questions in this Case arising rest only upon the construction of the Will of Thomas Blamford the Grandfather, and whether the issue of Thomas Blamford, one of the Sons, and first Devisees after the death of Alice the Wife, shall by this devise have and enjoy this Lease presently, and put out his Father and Uncle, or not.

It was urged, that he should not.

Coke Chief Justice demanded, What if they had Sons living at the time of the death of Alice the Wife, who should then have this Lease?

George Croke answered, That the two first Sons should have this, and not their Sons; they by this devise are not to have this presently, but after their deaths. Referred, is as much as to say, as this is to be reserved for them.

Coke. Without all question, his meaning here was, that if his Sons had, or either of them had issue Male, that such issue ought to have the Lease presently, after the death of his Wife: but if they had no issue Male, then they (S Thomas and Laurence) to have this equally and jointly, until they or either of them should have issue Male.

Dodderidge Justice. By this Will, the scope and aim of the Testator here was chiefly to make provision for the issues Male of his two Sons, but not for themselves. But if they had no issue Male at the time of the death of his Wife, then his intent and meaning was, to have this settled in his two Sons, until they or either of them should have such issue Male, but not any longer; for then this was to be presently after put out and employed for the profit of such Issues, or of such issue Male which they or either of them should have.

Coke agreed with him herein, for the Will is (if afterwards) it shall please God to send them any Sons, then, &c.

Dodderidge demanded, If they had such issue Male at the time of the death of the wife, whether Thomas and Laurence should then have the same Lease or not? Clearly they should not have it, but their Sons.

Houghton Justice agreed herein with him, for that Thomas and Laurence by this Will, were not to have this Lease absolutely, but with a (Si) and if no issue Male, they not to have it absolutely, but they were then to have the same only conditionally, and that with a (Si) also (S) and if afterwards it shall please God to send them issue Male, &c. then, &c.

Croke Justice to the contrary, The case here is, one having a Lease for years, makes his Will in and by which he makes a disposition of this his Lease, and that in this manner following, he had two Sons, Thomas and Laurence, 1. he deviseth this to his Wife for her life, and if she dies within the term, then he deviseth this to Thomas and Laurence his two Sons equally and jointly; if they have issue Male (in this clause next before he speaks only de modo habendi,) if they have no Sons, then they to be joint-tenants, but if they have Sons, then not to be so, but to be then as Tenants in Common; if both of them have Sons; this then to be reserved for  
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the benefit of such Sons, (but this so to be, after the death of the Father,) But here one of them hath a Son, and the other hath none, what is now to be done here in this Case? Whether this Son shall take presently or not, as to this he shall not have this Lease presently.

Coke. This is a plain Case in my Judgment; that if they have Issue male living at the death of the mother, the Sons then are to take nothing by this Will, but their issue male to have all; his purpose here was not to prefer his own Sons, with this provision, who then were ante oculos suos, but their Children.

Haughton. The immediate gift, by this devise, is to the issues male of his two Sons, (if they have such issues to take) if they have not so, then to themselves, until they, or either of them, shall have such issue to take. And if they die without such issue, then to others, &c.

Dodderidge. His two Sons Thomas and Laurence to have this; if they have no Sons, but if they have Sons, then (as it hath been said) they should be as Tenants in common of the whole term: If this should be so, then this should never come to their Sons after them; but the several moieties then to go to their Executors.

Haughton. Here when one of the Sons hath issue Male, he shall take this presently, and if the other Son also afterwards hath an issue Male, he shall then also take and enjoy the same with the other.

Coke. The Wife here is the first, to whom the devise of this was made for her life. If the devise be made in this manner, (S) that if J. S. shall pay 1000 l. to my Executors, that then he shall have my land to him and his Heirs, this is good so by devise, but not so by a Conveyance at the Common Law. If one doth devise his Land to another, until his debts are paid, the Executors have a term. But if one doth Lease his Land to one, being of a certain yearly value until his debts are paid. It was Resolved, Termin. Pasch. 24 Eliz. in C. B. as appears in the Bishop of Bath Case, 6 pars. fol. 35. b. that this is but a Lease at Will, without livery made, but if he makes livery, then he hath a Freehold.

Dodderidge demanded at what time the Sons of Tho. and Laur. should have this Lease? According to the devise they should have it at no time, by that construction which hath been made.

Croke. They are to have this after the death of their Ancestor.

Coke & Dodderidge. There is no word at all in the Will to warrant this to be so, but they are to have it presently, and not their Fathers.

Croke. This is not to be so, for by this Will they are not to have this till after the death of their Fathers, and this is so by the *forſque de modo habendi*.

Coke. Clearly they are here the immediate Devisees, if in esse at the death of the Wife.

Dodderidge demanded at what time this should be put out and employed to their use, where they are not in esse at the death of the Wife?

It hath been said, that this shall not be till after the death of their Fathers; this cannot be so, being not to be warranted by the words of the Will, the words being, that presently after their birth it shall be so employed.

Coke. This is as plain a Case as any can be, for the sole scope and intent of the Testator, as appears apparently by his Will, was to prefer the Sons of Thomas and Laurence, and this to go to Thom. and Laur. equally and jointly, if they have no Sons, otherwise if they have any; and if one of them have issue Male, he to have this alone; and if the other afterwards hath issue Male, he then to have this with him also: The very words of the Will make this plain, being (but if it shall please God to send them afterwards any Men-children, then, &c.) when they shall have any Men-children, then presently the same to be put out and employed for the sole benefit of them.

Dodderidge.

Term. Pasch.  
24 Eliz. C. B.  
&c.



Dodderidge. To maintain that which hath been said, there is no way but this, to refer the words to the possession, if they have no Sons, to make them joint-tenants; but if they have Sons, then to be Tenants in common.

Croke. If the words had been, if they have Sons, that then there should be no Survivor betwixt them.

Coke. Laymen do not know what a Survivor means.

Croke. Put the case that they both of them have Sons, and they both afterwards do die. Whether this shall be sealed in them till they die, and who shall have this afterwards?

Coke, Dodderidge, & Haughton, made answer, That clearly their Executors or Administrators shall have this after their death, for by the words of the Will, the Sons of the Sons had this devised to them absolutely.

Coke. If a man makes a Feoffment in fee to the use of himself for life, after to the use of every one of his issue Females, and to the Heirs of their Bodies, after to the issue of one Daughter at one time, of a second Daughter at another time, and of a third Daughter at another time, so that this to vest severally in them, and yet afterwards to all; they are here Joint-tenants, and yet they come in at several times: But the reason of this is, because the root was joint; this hath been so adjudged, and so here in this Case.

Dodderidge. If one hath a Lease for years, and doth devise that after his death, the Profits of this shall be put out to the use and benefit of J. S. this is a devise of the Lease it self to him.

Coke. Agreed this to be so; and so is 45 E. 3. tit. Feoffments, & Fairs for this doth tant amount unto a devise of the Lease: For if one doth grant unto another the profits of his Land, and makes Livery, this shall be a Lease for life.

In this Case all the three Judges were of Opinion against Croke Justice, and so without any further debating of this matter at this time, this Case was by the Court adjourned to a further time, for the resolution of the Court herein.

Afterwards, (S.) Termin. Hillar. 13 Jac. B. R. this Case was moved again, and argued at large by the Council of both sides, and afterwards by all the four Judges. Termin. Hill.  
13 Jac. B. R.  
&c.

It was urged for the Plaintiff, That this putting out to the use of Infants, is a Devise to them by Implication, as appears by 38 H. 8. Brook devise, placito 48. & Brooks Cases, fol. 71. placito 316. 15 Eliz. Dyer, fol. 323. 23 Eliz. Dyer, fol. 371. & 13 H. 7. f. 17. one deviseth, that after the death of his Wife, his Heir shall have the Land, this is a Devise to the Wife by Implication. 38 H. 8. Brook  
Devise 48. &c.

Then as touching this possibility of a Term, that this by limitation, as it was urged, may come from one to another, as is warranted by Mannings Case, Coke 8 pars, fol. 94, 95. Coke 10 pars, fol. 46. Lampets Case, Coke 6 pars, fol. 16, 17. Wildes Case, 14 Eliz. Dyer, fol. 304. and 16 Eliz. Dyer, fol. 333. Chapmans Case: Then as touching the first assent, to take as a Legacy, Whether this shall go to the others?

It was urged, that it shall so do, as it is resolved in Lampets Case, and in Mannings Case before remembred.

It was further urged, that this Devise being to the use of the Son, is all one as if it had been a Devise to him.

Coke demanded of Noy for the Defendant: If Thomas and Laurence had issue two Sons, living at the death of the Wife, who then should have this Lease.

Noy said, That to this he would speak afterwards.

First he agreed, The assent to the first Legacy, to be an assent to all the others in remainder.

Coke. This is very clear to be so of it self, and needs not any further Argument.

Noy

Noy for the Defendant urged. 1. That the Verdict here is imperfect: The Jury do find, that Thomas the Grandfather was possessed of the Tenement for 32 years; but whether this had continuance at the time of the re-entry of the Wife, or at the time of his death, is not found: it appears not by this Verdict, when the Lease did begin, nor yet when the same was to end.

Coke. If it be found (as here it is) that he was possessed of the Lease for 32 years: It shall be intended to be so at the time of his death.

16 Eliz. Dyer,  
fol. 331. &c.

Noy. As to the matter in Law, which rests upon the construction of the Will, Whether by this Will, the birth of the Son determines the Estate and Interest of the Fathers: This it doth not do, for the meaning of the Will is, the Fathers to have an Estate therein for their Lives, without being evicted of this by their Sons, when they should be born: Here they had not any Son when this devise was first executed in them (and if they shall have any Men-children) my Will is, that the same be then reserved, &c. to the use of &c. after one of them hath Issue a Male-child, Whether he is to have this now presently: He is not to have it, for the Grandfather did intend by this his Will, first to advance his own Sons, before the Sons of his Sons, upon this reason is 16 Eliz. Dyer, fol. 331. Clatches Case, and 17 Eliz. Dyer, fol. 342. and Trin. 2 Jac. C. B. between Pool and Spencer, where the Devisor had three Daughters and a Son, the Son was to have but for life, there adjudged the Son to have it in satisfaction of an Annuity; here in this principal Case, by the Will it is shewed when every one is to take; he had a purpose by this his Will to continue a means of living for his own two Sons, and not to strip them of the possession, upon issue Male had by them.

Haughton Justice. In this Case Judgment ought to be given for the Plaintiff: The question here rests upon the construction of a Will, in which the Devisor hath explained himself in these two courses; the Devise to be conditional to his two Sons, (S.)

If they have no Sons, and two, if they have Sons, then to be reserved, and put out, &c. so that he hath here by this expressed himself. The first is plain by the words of the Will, (S.) if they have no Sons, &c. It hath been objected, Quando, when this should be. It hath been urged, this to be taken at the death of Alice. If they have no Sons, then they to have this Lease equally and jointly.

In answer to this, if it should be taken so, then it would be against the Plaintiff, but the same ought not so to be taken, neither by the words, nor yet by the meaning of the Will. To make a true construction of this Will, the same is to be taken and considered altogether, both that which preceds, and also that which follows, if afterwards they have issue Male, &c. this to be at any time without any limitation; and this appears to be so out of the parts of the Will. For after in his Will, he hath another clause, (S.) If it shall fall out that they shall have no issue Male, then this is to come to the two Sons of Hen. Blamford, and therefore this is to be taken in answer to the objection made, Quando. If they have issue Male at any time, then; For he did intend by his Will to have this to come to a stranger, rather than to his own Sons. Also the Will is, If Thomas my Son have any Son, then he to give up his Estate into the hands of the Son, or to pay so much.

This is an Argument out of the Will, which doth satisfy me that the Son is to have this at any time when he shall be born, and this is to be collected out of the words of the Will. 2. Arguments to satisfy me against the former Objection; and in reason this also follows. For here is not one Interest depending upon another, but here is an Interest which may of it self commence at any time, and this Estate so commencing is not like unto a remainder, depending on a particular Estate.

Also the form of the words of the Will do satisfy me, being (if it please God) to send them Men-children. Then my Will is, that this shall be set forth, and this

to be so; if at any time they or either of them hath issue Male. 28 H. 8. Dyer, fol. 16, 17. Bowles Case, the condition of an Obligation for Marriage-money, being that if the Wife died before Mich. without Issue of her body, then living, that the Bond should be void; she had issue, and died, and the issue died before Mich. adj. the Bond to be void; for (tunc) refers to the last time, and relates ad proximum antecedens (S.) Mich. and not to the death of the Wife (tunc) significat tempus extremum. So here in this Case now in question, (Then) this stands with the matter and intention of the Will to be thus, (S) if any issue Male at any time be.

The second part of the Will, if they have issue Male; this rests upon the words of the Will, these words in Wills are unusual, yet as nearly as we can, we ought to take them according to the intent of the Testator; these words do give an interest, the intention of the Testator, &c. by the words, being. It shall be then reserved, and put out, &c. reserve, &c. this to restrain that which was given before; and this is the natural meaning of this word (reserved) this to be put out, for his benefit, and this is all one with a gift. If one gives to another the profit of his Land, this is in Law as a gift of the Land it self. So here these words in this Will do tant amount as an express gift to him, of this, and if such words have been by Law allowed for a grant of the thing it self, a fortiore it shall be so in case of a Will. 18 E. 3. fol. 18. A Lease made for life, & post decessum reverti debuit, a remainder taken for a reverter, being all one, the one taken for the other.

33 E. 3. Fitz. title Accompt, placito 130. A Lease made of Land for three Crops, this by necessary intendment to be a Lease for three years. 36 H. 8. Brook Feoffments al Uses, placito 52. Brooks Case, fol. 62. placito 282. Lease to one for life, and that after his death another shall have the profits; this is a grant of the thing it self: If it be so in grants, by such unusual words, a fortiori, it shall be so in case of Wills. A devise made to one of Lands imperpetuum, this is a good Fee-simple. Littleton, fol. 133. placito 586. but not so in case of a grant, there but for life; so here in this case, it is all one in Law as if he had said, that he should have this Lease, and so upon the whole matter the Plaintiff here hath a good title, and Judgment ought to be given for him.

2. Dodderidge Justice. It is in this Case to be considered in whom the interest of this Lease for years is, and this is the only question, Whether this shall be so vested in Thomas and Laurence, as that the same shall not be divested again out of them by the Son afterwards born? As to this, it is not so settled in them by this Will, but that their Interest shall be determined by the Son after born, this so happening at any time during their lives. And for proof of this, I shall not insist upon many Cases, it being very difficult to find Cases for to match with this particular Case. But many Cases there are upon the general Rules for the construction of Wills, but every thing is to be ruled according unto the particular reason of the same.

As touching the general Rules to be observed for the true construction of Wills, In testamentis plenius testatoris intentionem scrutamur. But yet this to be observed with these two Limitations. (S.) 1. His intent ought to be agreeable to the Rules of Law. 2. His intent ought to be collected out of the words of the Will. As to this it may be demanded how this shall be known. To this it may be thus answered, (S) 1. To search out what was the scope of his Will. 2. To make such a construction, so that all the words of the Will may stand, for to add any thing to the words of the Will, or in the construction made, to relinquish and leave out any of the words, this is maledicta glossa. But every string ought to give his sound; as I shall make the same to do in the course that I will pursue, for the true construction of this Will. First, we are to see and examine what was the scope of this Clause. First, he intended with this to advance his Wife in present, in future,

28 H. 8. Dyer  
fol. 16, 17.  
Bowles Case.

18 E. 3. f. 18.  
33 E. Fitz. &c.

36 H. 8. Brook  
tit. &c.

Littleton, fol.  
placito 586.



to advance his Grand-Children, if he should have any, so that his Grand-Children Male are within the scope of this Will to be by this advanced: And this to be so, is plain by very many Circumstances in this Will.

First, He hath here in part advanced Thomas and Laurence his Sons in his life, by act executed; and if Thomas had Issue, then he to take the Interest of Laurence, in other Tenements (given to him before) (S) Holts, he to surrender this into the hands of friends, or otherwise, to give 20 l. to the Son of Thomas.

A second Circumstance, I bequeath it and my term to Thomas and Laurence, (if they have no Sons) equally and jointly: And if they have any Men-children, then my Will is, &c. The first Clause is without any limitation of time, being indefinite, for he cannot restrain the Will of God to any time certain; he therefore speaks indefinitely, with a reference of his Will to the pleasure of God, which cannot be restrained by men.

And so he doth afterwards, when he limits this to his Son in law's Children; if it fall out that my Sons shall have no issue Male, Then my Will is, that after the death of my two Sons, it shall descend and come unto the two Sons of Henry Blamford my Son in law, (S) Robert and Stephen; so that every word of the Will speaks to advance and make good this Construction.

Here are two questions to be considered, and this is the main, Whether this term, after the death of the Wife, be absolutely then settled in Thomas and Laurence as an absolute devise or not? And as to the word (have) this is not to be referred to the death of the Wife, but indefinitely, whensoever they shall have, &c. If they shall have Men-children, then when? whensoever they shall have: By this Clause of the Will there is no present devise, but a cautionate provision for the Grand-Children, they to have this Lease then when they are born: His own Sons to have this no longer, but until they have Issue male.

I shall frame three Cases out of this Will, which will make an end of this question.

1. I bequeath it and my term to Thom. and Laur. my Sons, if they have no Sons; put the case that at the death of the Wife they have no Sons, but the Wife of Thom. had been great with child with a Son, yet they are to enter and to retain this until the Son be born; and if Thom. dies, Laur. to have this by Survivor; after the Son of Thom. is born, he shall now oust Laur. who had this by Survivorship.

Also admit, that Thomas had a Son, who had this by Judgment of Law, and after Laur. also hath a Son, shall the Son of Thomas retain this? he shall not, but the Son of Laur. quodocunque he shall be born, he shall be Joint-tenant with him by the words of the Will, they having a joint title, and therefore they shall be joint-tenants according to the meaning of the Will: He deviseth it and his term to Tho. and Laur.

Obj. Hence it hath been Objected, that Thom. and Laur. were by this to have the whole Term.

Resp. This cannot be so: But they are by this Will to have this for so many years as they shall be without issue Male, and then their Interest to be determined.

It is the office of a Judge, in the Interpretation of a Will, to give unto every word in the same its true force and strength; so that by this Construction, this is to be done here, that by this Will the Lease is to be to Thom. and Laur. until they or either of them shall have issue Male; for the Estate of Tho. and Laur. herein, is to be taken with this limitation, (S) until, &c. But if any other construction should be made of this Will as for the Defendant, they would have it to be, this should be to make the Testator to speak things contrary in themselves: If they would have this to be settled in Thom. and Laur. by this they should offer great violence unto the Will, and should by this infringe the intent and meaning of the Testator.

For

For first, if this should be so, by this no provision should be made for the Grandchildren, and so this should be taken away, which was the chief scope of the Will.

Also if it should be so, they would by this infringe the later part and scope of the Will, which was to have this Lease to come to the two Sons of Henry Blamford his Son in law, for default of issue Male of his own Sons; and this should be altered, if by the construction made, this should be settled in Thom. and Laur. absolutely: This should be by way of diminution, and to abridge the words of the Will.

Also by such a Construction as would be made, they must add words to the Will, (S.) they must add the word (then) and where the clause was before indefinite, by this construction they are to make it so, (S.) If they then have no Sons, and so by this they will restrain the generality of the Will unto a time certain: But such construction shall be to make a clog to the Will, and this shall be to offer violence unto the Will; and to this it may be said, *maledicta expositio, quæ corrumpit textum*, either by addition to the Will, or by any diminution of the same: And this shall suffice for the first part of the Will: And this is not unusual in our Books for Judges to make construction of Wills, according to the intent and meaning of the parties, as appears in Plowdens Commentaries, fol. 541. in Par-

*Plowdens  
Commentaries  
fol. 541, &c.*

And as touching the like construction made, appeareth Coke 1 pars. fol. 76. b. *Coke 1 pars. f. 76. b. &c.* in Bredons Case, and in 19 Eliz. Dyer, fol. 357. where Chick deviseth a House in Soper-Lane to Alice his Cousin in Fee-simple, and after her decease to W. her Son, which W. was Heir apparent unto A. and no Estate limited unto W. the Judges there found a way to make all the words of the Will to stand, they there adjudging Alice to be but Tenant for life, the remainder to the Son for life, the remainder unto Alice in Fee; so here in this Case.

It is one of the most difficult things in the Law, to make a true construction of a Will, when one by construction makes all the words in the Will to stand, by this he hits the true intent and meaning of the Devisor.

2. The second Point arising upon the words of the Will, (S.) Then my Will is to have this reserved and put out: In which it is to be considered what manner of Will this is to his Grandchildren; he gives no Estate to them, he hath limited an Estate.

In this I will not seek Cases to insist upon, as where a gift of the Profits of the Land, to be a gift of the Land it self; this is a plain Case: But it appears here by the words of the Will, he devised this to Thom. and Laur. (if they have no Sons) but if they have, then their Sons to have this: By this a plain Interest is given to them; so lay these words together, (S.) the putting forth, with the gift to the Fathers, and so all will well follow consequently.

30 H. 6. Brook, tit. Estates, placito 74. Fitz. tit. Devise, placito 22. A man devises Land to three men, and that one of them shall take the Profits, and dies, this makes a use in him, and this is but an Estate for life. *30 H. 6. Bro. tit. &c.*

3. A devise of the Profits of the Land, is a devise of the Land it self: A Feoffment in Fee made, reserving the Profits, is a void Reservation; and so upon the whole matter, the Plaintiff here hath a good title to this Lease by the Will, and Judgment ought to be given for him.

3. Croke Justice. It is a very hard thing to draw a perspicuous sense out of dubious words; as this Case here is upon this Will, Judgment ought to be given for the Defendant; and that the Plaintiff, the Son of Thomas comes here ante tempus petere, secundum nomen, ita res est: Testamentum est testatio mentis. Thomas the Plaintiff is not to have this during the life of his Father.

It must be agreed, that subtilis constructio is not to be, and that Turpis est pars, quæ non convenit cum suo toto.

It must also be agreed, that such a construction ought to be made of a Will, by which all the words may well stand together.

Coke 3. pars,  
&c.

It is a good Rule put in Borastons Case, Coke 3. pars, fol. 20. b. for construction of Wills grounded on this reason, Quia testator est inops consilij.

In the argument of this Case, I will by my construction, make all the words and parts of the Will to speak and stand well together; Whether these words in the Will are to be referred to a conditional bequest, or to the taking of Thomas and Laurence jointly?

These Expositions ought to be observed in every Will, (S) First, Quid. 2. Quibus, & 3. Quomodo.

And in these steps I shall go in the construction of this Will.

This old Thomas Blamford the Grandfather observed a good course, Statutum est omnibus semel mori, & dispone domum tuam, nam morieris; here he makes his disposition.

1. Quid, (S.) his Living called Gowens; this is in peace.

2. Quibus, He had here four persons in his Eye.

1. The Wife of his bosom, chara uxor, chara conjux.

2. His Children, grati liberi, grata pignora.

3. The Sons of his Sons. And.

4. He had a purpose to continue this in his name, and this was the intent of old Thomas Blamford.

1. To his Wife, Quomodo, this is in peace: In secunda questione quæro; Quomodo, this was not absolutely to her for her life, but upon condition that she should not sell it, and not otherwise, and this De modo habendi.

If it had been demanded, but who shall have this after the death of his Wife? he would then have answered, my Sons Thomas and Laurence: But this may last longer than their lives; if he had been demanded, who shall have it after them? his answer, If they have no Sons, then they to have the same jointly: Qui bene interrogat, bene docet: In one degree they are to have it, if they have Sons, and in another degree if they have no Sons.

If they have no Sons, there they to take it jointly, and the Survivors to have it; otherwise if they have Sons, there no Survivors to be; and by such construction there will be no contrariety. The which will be, if any other construction be made of this Will; and this would be vim literæ, & vim naturæ secare; here he did see ante oculos suos, that his Sons had no Sons, and therefore they Simpliciter & absolute were to have this. Intricacy and inconveniency would ensue, if any other construction should be made. This Thomas here an Infant would put out his Father, this is ante tempus petere, & filius ante patrem, and to make this to be so, would be subtilis constructio. But ex præcedentibus & consequentibus, construction ought to be made, and so by this construction it would not be to offer vim Literæ, nor yet vim naturæ. Another thing to be observed in this Will. (S.) If they shall have any issue Male; then this shall be reserved and put out, &c. this Clause hath an Emphasis in it (reserved) for whom, and from whom? from him who was to have this by Survivors. Ne jus possessionis, Ne jus proprietatis, by this Will is given to this Infant. And by Implication, an express devise to his two Sons, is not to be controuled; and such construction to be made of a Will appears by Frenchams Case, in 2 Eliz. Dyer, f. 170. Another thing is also to be observed in this Will. (S) The Sons of the Sons to have this, loco suo



& ordine (S) in the third place. And in the fourth, others to have it, who are named in the Will. And so by this Will, the Defendant hath a good title; and consequently Judgment ought to be given for him.

4. Coke Chief Justice. Virgil in his *Georgicks* well saith, that there is no ground so barren, but by fruitful Husbandry it may be made good; and this is very true, so here, in this barren Case which hath been made a good Case. I do agree all the grounds before put for construction of Wills. But *vita regular est applicatio*. This Case hath been very well argued, In this case upon the Will, I conceive the Plaintiff to have a good title, and that Judgment ought to be given for him. If the Rule be true, every special case hath its special reason. They which do put many cases upon general grounds, do the least hurt to the case in question.

These Rules are to be observed for construction of Wills.

First, The intent of the Devisor is to be observed.

2. This intent ought to be taken and collected out of the Will it self.

And

3. This intent ought to agree with the Rules of Law.

In this Will I shall examine the meaning of this good old man here, whether the Sons of his Sons to have this Lease, and his own Sons nothing? As to this, Grandfathers sometimes have as great an affection to their Grandchildren as to their own Sons. He hath here provided for his Sons in his life time.

1. By this Will his Wife is to have this Lease for her life.

In this Will, this is to be observed, that none hath any absolute Estate given unto them by the same. (But the Sons of the Sons only.) The Wife he hath a conditional Estate, his Sons also have a conditional Estate. But as for his Grandchildren they are to have this Lease by the Will absolutely: and by their death the same is not to revert again unto Thomas and Laurence, but unto the Administrators of the Sons; after her death, I bequeath it (S) Gowens, and my term to Thomas and Laurence, if they have no Sons; if he had been demanded this, (what if they have Sons) then it is plain that by the words of this Will, Thomas and Laurence ought not to have this omnino, (equally and jointly) this goes unto the Estate if they have no Sons; this is not to be referred to Children.

As to the interest in Gowens, (if they have Sons) there is then no question that Thomas and Laurence are not to have it; this is as a Condition precedent to them. In the construction of Wills, we are to construe words according to Etymologies; they who are not to have joint Sons: his intent by the scope of this Will, was to prefer his Grandchildren (by the construction which hath been of this Will) if they have Sons, or have no Sons, the Fathers to have this Lease first before the Sons.

The first point in this Case material to be considered, who was originally intended to be advanced by this Will. The Sons of his Sons. If they have no Sons at the death of the Wife, his Sons then to have it: How long are they to have it? The Will clears this (S) But if it please God to bestow on them Men-children, Then my Will is, that it be reserved and put out, &c. Then when born, to the use and profit of them. There is no doubt at all to be made of this. *Maledicta expositio quæ corrodit viscera textus*. By the construction which hath been made of this Will, they would couple this (S) if they have no Sons, to the death of the Wife. This was no distinction in his intent, the time of the birth of the Sons is not here material. But quodocunque, this shall happen, they then presently to have it, and this is the reason given in *Shellyes Case* 1 pars. So that no reason can be made from the time of the birth, for the act of God shall never breed any Calamity to one who is not born. It is to be observed for a Rule, *generalis verba gene-*

generaliter sunt interpretanda, and this is a Rule in Law: If it shall please God to, &c. then. There is no reason to prejudice these Grandchildren if born one hour before or after his death. His intent by this Will was, when they should be born, then to have it. He died 1. Martij. he made his Will in January before; when the first Thom. Bl. died, the possibility did then vest presently in his Sons Thomas and Laurence, and he did know this, that they had no Sons at the time of his death, by the Will Thomas and Laurence to have this Lease, if they have no Sons; But here they have Sons, ergo.

By this construction, I shall make every word in this Will to speak. If they have no Sons, then they Thomas and Laurence to have this. But how long? The Will answers, when they have Sons, then they to have it; they are born, then they, the Sons of the Sons to have it, and they have an absolute Estate therein, their Father had but a limited Estate in this Lease, and no Estate at all therein, if they had Sons. If they had no Sons, then after their deaths, the same to go to Henry Blamfords two Sons, in manner as before, maledicta expositio quæ corrodit viscera voluntatis. As to the words in the Will of Reservation. It shall be reserved and put out, &c. Here is a possibility upon a possibility; how this can be, may be questioned upon the Opinion of Popham Chief Justice. As touching this, see 1 pars, fol. 155. in the Rector of Cheddingtons Case, where Welkdens Case, Plowdens Commentaries, fol. 520. is cited.

Coke 1 pars,  
fol. 155, &c.

15 H. 7. fol.  
10. 40, &c.

24 E. 3. fol. 29.

44 E. 3. Fitz.  
title Tail, pla-  
cito 13.

Paramour &  
Yardleys Case,  
&c.

I agree, that sometimes one possibility shall not beget another, as touching this, see 7 H. 4. fol. 16, 17. one gives Land to a man not married, and to a woman, and to the Heirs of their bodies, this is an estate tail in them vested, there is a future possibility of a marriage; they intermarry, afterwards they are divorced: their issue not to inherit by the divorce, their estate is now turned into a frank-tenement. So possibility executed, & possibilitas dissolutionem executionis, shall not be revived. If Land is given to a married man, and to a married woman, and to the Heirs of their bodies, by 15 H. 7. fol. 10. 40. Affisar. placito 10. Plowdens Commentaries, fol. 35. a. in Colethirts Case, and in Chidleighs 1. pars, this Resolved to be a present Estate tail; this is more remote than the other, and yet a present Estate tail. If Land be given to two married men, and two married women, and to the Heirs of their bodies, by 24 E. 3. fol. 29. this doth vest in them, questioned whether they shall have an Estate tail presently upon this possibility, of cross marriages, they have joint Estates, and several Inheritances not upon the possibility, post executionem status, lex non patitur possibilitatem. If Land be given to a man, and to two women, and to the Heirs of their bodies, here duplicationem possibilitatis Lex non patitur, 44 E. 3. Fitz. title Tail, placito 13. ruled accordingly, where Land was given to two Men, and to a Woman, and to the Heirs of their bodies but for life. But we here in this Case are out of all these grounds. We are upon the vesting of a possibility. It is a plain Case, that this may so be, as this case is, for otherwise this would shake all common assurances, here 1. to one Son, 2. to another, and so if there be a good ground-work to support this, it shall be good. If a Lease for life be made to one, the remainder to the right Heirs of another, and afterwards to, &c. in Paramour, and Yardleys Case in Plowdens Commentaries, express authority for this, where all the remainders are allowed to be good. Mich. 34 & 35 Eliz. Locrafts Case, put in the Rector of Cheddingtons Case, 2 pars, to this purpose, 7 E. 6. Brook Grants placito 154. Brooks Cases, fol. 95. placito 437. if one grants his term after his death, this is not good, but if it be by way of Lease, it is good. So E. 3. fol. 27. a Lease made to one for life, reserving for the first seven years a Pepper-corn, and if he will hold it after then 20 l. and binds him to reparations for the first seven years, after the first seven years he will not hold longer; an Action of Covenant lieth for not repairing: An

**An** Executozry Devise is good, as appeareth in Matthew Mannings Case, 8 pars.

Coke 8 pars.  
&c.

**In** Obj. It hath been objected, that changing of the words makes a change of his meaning.

**Resp.** As to this: 1. He here gives it unto his two Sons. 2. If they have Sons, then the same to be reserved and put out for them, &c.

This Reservation amounts unto a Grant, as appears by 8 E. 4. fol. 8. b. 20 E. 4. fol. 13. b. so resolved 26 H. 8. fol. 2. 21 H. 7. fol. 11. 35 H. 6. fol. 34. that a reservation amounts unto a Grant, a fortiore it shall be so in case of a Will; reserved, this is as much as to say, preserved for the Sons of his Sons; reserved, put out for the profit, &c. all these words do give an Interest.

8 E. 4. fol. 8.  
&c.

The reason of this Case, his own Sons, not to have any Interest by this Will, if they have Sons; if they have no Sons, the meaning of the Testator by these words appears to be, that by the birth of the Sons, the Interest of the Father to be by this presently determined, (as there were Censores morum, & tutores in Rome) so we here are for the Subjects.

I move this, in regard that the Infant here is but of eight years of age, and he is likely to have Judgment given for him; and therefore we are to take the same course for him, as we did in Requisites Case here, by way of provision for him; here will be 13 years before he will come to have a disposing power of the term, and his Guardian or Bayliff may die before, and therefore they ought here to put in good Security to be answerable for this, 45 E. 3. by the Grant of the Profits of the Land, the Land doth pass.

Coke & Dodderidge. If the two Sons had ten Sons, they all shall have the Lease jointly.

Croke. By this Will it is thus to be, that if they have no Sons, then the Survivorship to take place between them, but otherwise if they have Sons.

By the Rule of the Court the Bayliff to be bound to answer the Profits to the Infant.

And so by the Rule of the Court, by three Judges, (S) Haughton, Dodderidge, & Coke, Judgment was given for the Plaintiff: But with a Cessat of Execution until Termin. Pasch. next ensuing.

Judgment for  
the Plaintiff,  
&c.

### Codd Plaintiff against Turback

#### Defendant.

**C**odd being brought to the Bar by a Habeas Corpus upon the Return, it appeared that he was committed by the High Commission Court, for refusing to allow Alimony, for maintenance of his Wife, and for speaking diversa opprobria verba: The Court was moved to have him bailed, the return being insufficient, it being not shewed what the words were, nor when they were spoken, and so no certain cause shewed of the Imprisonment.

A Habeas Cor-  
pus, Alimony.  
Mo. 840.  
2 Bull. 300.  
1 Ro. Rep. 245.  
Post 145.

Coke Chief Justice. The return here is not good, the cause of the commitment in this return, ought certainly to appear, it is here altogether uncertain, the time uncertain when the words were spoken, it might be in the time of Queen Eliz. and so the same pardoned.

The Court all clear of Opinion, That the Return here is not good.

Coke. By the Law of God, none ought to be Imprisoned, but with the cause expressed.



pressed in the return of his Imprisonment, as appeareth in the Acts of the Apostles.

The whole Court agreed, that the return was not good, and so by the Rule of the Court he was bailed.

Coke. This kind of Imprisonment is much to be disliked, being a very great grievance and vexation to the Subjects.

### The KING against the University of Cambridge.

Indictment.  
1 Ro Rep. 245

**B**y an Indictment for a Riot, prosecuted against the University of Cambridge, for the imprisoning of one there by the Proctors, for matter of Incontinency, this prosecution was for a Riot, made by the Proctors in their search.

Stat. of 32 H.  
8. cap. 10.

Coke Chief Justice. They have a Charter to Imprison there for Incontinency, but this their Charter is void: They have also an Act of Parliament to enable them to do this, (S.) 32 H. 8. cap. 10. and this is the reason that the Proctors of Oxford and Cambridge may Imprison for Incontinency.

This matter was at the Council Table, but they there could not determine of Riots.

The Lords of the Council are the Representative Body of the King: If the Council Table do order that the Kings Attorney General shall enter a Non vult prosequi, this is good (but this Power which they have doth not appear unto us) and the Rule of the Law is, Quod de non apparentibus, & non existentibus, eadem est ratio: Here there hath been very great negligence in them, & negligentia semper habet infortunium comitem: Here the Indictment was against the University of Cambridge, and prosecuted against them by their negligence, almost to an Extremity.

The Court all agreed in this, that their best way is now to plead to the Indictment, and to shew their Charter, and also to plead the Act of Parliament: And then the Kings Attorney General may confess this to be so; and this is the best way now for them, it being three years since, and so very great negligence in them.

And they all agreed in this, that this is clearly the suit of the King, and there is but one Complaint, and the King may surcease this when he will, and the Kings Attorney may enter a Non vult prosequi.

Coke. The Council Table doth not use to meddle with Riots: This was the direction given by the Court, the which was followed, and so ended this way, the same being never after moved again.

*Flint Plaintiff, against Langhorn & Al.  
Defendants.*

Entred Hillar. 12 Jac. B. R.  
Rot. 1256.

A second deliverance.  
1 Ro. Rep. 246  
2 Ro. Abr. 406,

**I**n a second deliberance against the three Defendants, as Counsellors, who did make Conusans as Payliff to one Leak: The Case was this, A Rent-charge was granted unto Leak, to be paid at the two usual Feasts of the year, &c. and if the same was behind at any of the Feasts, or 21 days after, then to distrain, &c. The three

thre as the Conusars, for this Kent behind, did take the Distress; afterwards before any Abowzy made, one of the thre Conusars doth release unto the Plaintiff all Suits, Actions, and Demands, Whether this release be good, or not, was the only question.

It was urged, that this Release was not good, for that a Release made, ought to be to determine something; but here, when this release was made, there then was nothing to be by him released, here Leak was the Grantor of the Kent; the Distress was taken 4. Januarij, 11 Jac. 3. Novembris 12 Jac. the Release made, and Hillar. 12 Jac. the Conusars made and pleaded; so that here nothing is released, being of all Demands, there was no Action, no right being made by one of the Conusars; these thre Conusars were as Servants to Leak the Grantor, and nothing is discharged by this Release. And this is so warranted by Ruddocks Case, Coke 6. pars, fol. 25.

Coke 6. pars,  
fol. 25. in *Ruddocks Case*.

Coke Chief Justice. If I do lose my goods, and another finds them; if I send my Servant for them, and he refuses to deliver them; afterwards my Servant doth make a release to him, quid operatur, by this? Nihil. In Ruddocks Case. A Replevin brought against six, one of them abows, the other five do make Conusance as Bailiffs to the first. Judgment given against them; the sixth brings a writ of Error, the Defendant pleads a release made by one of the five, this is a void Release, and to no purpose, as it is there adjudged: Here in this case the Release is clearly void, he which doth release being but a Servant; what award shall be made here? nothing doth pass by this release, he which doth release hath no manner of demand to release, and this is warranted by 21 E. 4. fol. 43. b. by Fairfax.

21 E. 4. fol. 43. b.

It was urged for the Release, that this should be good, because they are intituled to an Action to have a return, and also to sue execution, and their Master to have an account of them, and this is the act of the Master, who hath made them his Bailiffs, the release here is but to bar him, as to have any return and damages for the Bailiffs, petunt retournam & damna, they all thre are intituled to the Action.

Coke. The time of the Release here is to be considered, then he had nothing in him, but as a Servant unto Leak, he had nothing to demand, but by the command of such a one he had taken the Distress; then they come to make Conusance as Bailiffs to Leak (but before this Conusance so made) one of them doth release all Demands, (whereas he hath nothing to demand.) By 49 E. 3. fol. 25. If a Bailiff doth abow one way, and the Master another way, the Abowzy of the Master shall be taken, and it is a very plain Case, that the release here of the Servant is not good, for he hath nothing to ground a release upon, if this release had been made after the Abowzy, there peradventure it might have been another Case, but here the release is made before the Abowzy, and so without any colour of question, the same is void.

49 E. 3. fol. 25.

Haughton Justice. The Case in 21 E. 4. fol. 43. will go very far in this Case.

The Court all clear of Opinion, That this Release was not good, i. and therefore by the Rule of the Court a Return was granted, this Release being no bar at all; upon this—

Jermyn moved the Court pro Retorno habendo, and by the Rule of the Court A Return was granted, there being no colour (as the Court observed) to maintain this Release to be good, when as the party which made this Release had nothing in him at that time to release. *granted per Curiam.*

Slingsby

*Slingsby Plaintiff against Lambert*  
Defendant.

Entred Termin. Mich. 12 Jac. B. R.  
Rott. 540.

Error Sur-  
Judgment in  
an Action up-  
on the Case  
for an escape.  
2 Cro. 394.  
1 Ro. Rep. 276.  
Godb. 262.

**I**n an Action upon the Case brought by the Plaintiff as Executor against the Defendant being Sheriff, for an Escape, and had a Judgment given for him per nomen of Executor.

Which Judgment passed by Non sum Informatus; upon this Judgment, a Writ of Error brought, and for Error assigned, because the first Judgment was given for him as Administrator, and this Action for the Escape, and the Judgment upon it was per nomen of Executor, and so a variance.

It was urged, that the suit was first commenced by the Plaintiff in the Action as Administrator, that afterwards he found the Will, by the which he himself was made Executor, and therefore by the name of Executor he had Judgment, and the party in execution who was suffered to escape, and upon this escape, the Action upon the Case was brought by him, which was well brought, and the Judgment well given, and for the per nomen, this appears by 9 H. 6. fol. 1. and 31 E. 3. fol. 1.

9 H. 6. fol. 1.  
31 E. 3. f. 1.

The first Action here was as Administrator, and so he had his Judgment against Brown as Administrator, and had him in Execution, who was suffered to escape.

Against this it was alledged, that this Action upon the Case for an Escape was brought by him as Executor, grounded upon a former Judgment given for him as Administrator, which cannot be good.

Dodderidge Justice. The Case is this, one recovers in Debt as Administrator, hath Judgment, and the party in execution, who escapes; Afterwards he finds the Will, by which he himself was made Executor, whether he shall have an Action upon the Case, or an Action of Debt upon this escape as Executor is the question: the Administration is granted upon no Will found, he recovers the Debt, afterwards the Will is found, by which he is made Executor to the same party, and proves the Will; clearly this shall now be assets in his hands. But such an Executor shall not have a Scire facias upon the first Judgment, because he is not party to the Record.

Haughton Justice. The Executor here hath no privity to sue Execution, upon this Judgment, because the Scire facias depends upon the first Action, and to this he is not privy.

Dodderidge. I agree that he can have no Scire facias, he hath him here in Execution as Administrator, so that now he remains in Execution as a pledge for the Debt; after he finds the Will, and perceives himself to be made Executor, pro ut by the Will: put the Case that the party pays the money recovered to him, may he not now well discharge him, declaring so much unto the Sheriff: clearly he may, and if the Sheriff upon this matter shewed thus unto him, will not yet deliver him, he may then clearly have against him an Action of false Imprisonment.

Croke Justice. If this probate of the Will by the Administrator, who recovered, by which he is made Executor, is the Execution upon the former Judgment, by this gone: clearly it is not; though the Book of 2 R. 3. fol. 8. hath been cited to the contrary.

Dodderidge.



Dodderidge. That is where another man is made Executoꝝ, and not where the party himself is made Executoꝝ, as here in this case. If the Administrator hath one in execution for Debt, the Sheriff suffers him to escape, he brings his Action of Debt against the Sheriff for this escape, and herein recovers; after all this, he finds a Will, by the which he himself is made Executoꝝ, shall not this recovery thus had now be good? clearly it shall, and this mony thus recovered against the Sheriff, shall be assets in his hands, and no Audita querela in this Case lieth for the Sheriff.

Croke. If he be suffered to escape, the mony not paid, and all this at his suit, as Administrator; afterwards he finds the Will by the which he is made Executoꝝ, and proves the same; shall this mony now be lost which was recovered, and the party in execution for it? clearly it shall not.

Haughton. Now upon the matter this is a void Administration, and how can he discharge the execution of the Body, there being no satisfaction given of the Debt? The Executoꝝ here is to have an Action of Debt for the mony due, but he is not to have execution of that which was done upon the suit, commenced by the Administrator; here it is like unto a Scire facias, a thing Executoꝝ begun by one as Administrator, an Executoꝝ cannot prosecute this, nor have an Execution upon it.

Dodderidge. If the party in Execution stands as a pledge for the Debt unto the Administrator, shall he not do so to the Executoꝝ? clearly he shall. If an Executoꝝ recovers a Debt, and hath the party in execution, who is suffered to escape, the Executoꝝ makes his Executoꝝ, and dies, shall not this Executoꝝ of the Executoꝝ have an Action of Debt upon this escape? without all question he shall have it, for he is now Executoꝝ unto the first man.

Haughton. If the first Executoꝝ dies intestate, his Administrator shall not have an Action of Debt against the Sheriff for this escape, no more shall the Executoꝝ here in this principal Case have his Action against the Sheriff for the escape of him who was in execution at the suit of an Administrator.

Dodderidge & Croke were clearly of a contrary opinion, and so without any further debate, this Case was adjourned to a further time, but was never moved again, but the parties perceiving the opinion the same (ut audiui) was ended by agreement.

The Court divided, two against one, ended by agreement.

### The KING against Sir Nicholas Poynes and his Son.

Who were indicted for murder, and committed to the Marshalsey, without Bail or Painsprize.

1 Ro. Rep. 268.  
Endicement  
for murder.

Trotman moved the Court to have them bailed, because they were not indicted but by the Coroners Inquest, and no Verdict as yet given up by them, and that as he urged, it was se defendendo.

Coke Chief Justice. If one do kill another, it is not known at the first, whether this be murder or not.

By the Statute of Westminster the first, cap. 15. for the death of a man, in such a Case he is not to be bailed. By the Statute of 1 & 2 Philip and Mary, cap. 13. a man is to be bailed in case of Manslaughter, if he be bailable by the Law. But in case of Manslaughter he is not bailable in all Cases. If he confess the same, he is not bailable. For the death of a man, I will not bail any one, (unless it be by the Command of the King.) We may bail one here for Treason, but this we will not do.

Stat. of Westminster the 1.  
cap. 15. &  
1 E. 2 Phil. &  
Mar. cap. 13.

Q

Haughton

Bail refused  
to be taken.

Haughton Justice. If he do confess this to a Justice of Peace, that he did the fact, he is not to be bailed.

Coke. So shall it be for a notorious Man-slaughter, he is not to be bailed.

The Court refused to bail him, and so by the Rule of the Court they were sent back again to the Marshalsey.

Nota.

Nota, That one having a Judgment in this Term, upon which Judgment a Writ of Error brought, bearing Teste the last Term, returnable in this Term, the which had the Judgment, came to the Clerk to have out his Execution; the Clerk upon view of the Roll, and finding no mark thereon for a Writ of Error, took out the Execution, after Execution granted, the Roll was then marked for the Writ of Error, with an Antedate and a Superedeas delivered before Execution done, the Sheriffs Deputy makes his Warrant out for doing of execution.

Coke Chief Justice & Curia. We will not allow of these Antedates. This is a very great abuse to the Court, for to enter a Writ of Error with a recipitur of the last Term; this course cannot but be very much disliked by us: this is the second we have known of this kind, take heed of the third, for this is a very great abuse, and not to be suffered; For the preventing of which hereafter, by the Rule of the Court an Order was entered, That the Clerks do mark the Roll presently, (S) that is to say, the same day that the Writ of Error was taken out.

Nota.  
1 Ro.Rep.272.

Nota, That in an Ejectione firmæ the Jury found for the Plaintiff, and gave one shilling damages, and one shilling costs, and de Incremento 17 l. The Clerk in the entering of this, enters it all right, (S) 1 s. Damages, 1 s. Costs, and 17 l. de Incremento, quæ in toto se attingunt, to 17 s. and omits the two shillings.

Thomas Crew moved the Court to have this amended.

The Court granted this being in the same Term, and the omission of the Clerk only in the Account, and calling up of the quæ in toto, which is not so much material. And so by the Rule of the Court the same was amended.

Nota, Error.  
1 Ro.Rep.272.  
2 Ro.Abr.669.

Nota, Upon a Venire facias ret. for trial of a Cause, the Pannel was challenged, because the Under-Sheriff who returned the same was Cousin to the party, &c. and therefore a Venire facias de novo granted to the Sheriff, Ita quod, that the Under-Sheriff non se intromittat, upon this a Trial was had, Verdict and Judgment given for the Plaintiff, for reversing of which Judgment, a Writ of Error was brought, the Error assigned was, because the Venire facias was Vici-comiti, whereas the same should have been Coronatoribus.

The Writ of  
Error quashed,  
Execution  
granted.

Curia. This is only an Error to delay Execution, and not to be maintained; and therefore by the Rule of the Court the Writ of Error was quashed, and Execution granted.

Nota.

Nota per Curiam. That the whole Term is but as one day. And that all the Judgments here are entered as upon the first day of the Term & per Curiam, and by all the Clerks all common Bails are entered upon a day certain. But as for special Bails there is no certain day when to be entered, & per Curiam it is no error to say that there was no Bail entered.

Nota.

Nota per Curiam. If a Parson do libel for Tythes of Coal digged out of a Mine, or for Stone out of a Quarry, a Prohibition is to be granted.

## The KING and Doctor Gouge.

**D**octor Gouge being committed to the Prison of the Fleet, by the Court of Chancery, was brought to the Bar by a Habeas Corpus, and the return was read: By which it appeared, Quod commissus fuit, virtute cujusdam ordinis Cancellarie, for his contumacy and contempt, in refusing to answer unto a Bill there exhibited against him, and he being by order of the Court to answer it. A Habeas Cor.  
pas.  
1 Ro Rep. 27  
1 Ro Rep. 311

Baughirey Serjeant moved the Court to have him delivered, he having a Judgment at the Common Law in this Court, for the same matter now complained of against him in Chancery: That the return here is insufficient, the same being altogether uncertain: For Non constat Curie, what Bill this was: And there to question a Judgment given in this Court, is against the Statute of 4 H. 4. cap. 13. Stat. of 4 H. 4.  
cap. 13. That Judgments here given are not to be avoided, but by a Writ of Error, or by Attaint.

Against this, It was alledged that this Bill preferred against him, is for other matters, and not for any thing touching the Judgment here given.

Coke Chief Justice, & Dodderidge Justice. Consider the Statutes of 27 E. 3. cap. 1. & 4 H. 4. cap. 13. It would tend to the downfall of the Common Law, if Judgments here given, should be suffered to be called in question in Courts of Equity. Statute of  
27 E. 3. &c.

Coke. It doth not here appear unto me, that the Bill was there exhibited for the same cause as the Judgment here was; and 9 H. 6. c. 44. leads me to this; we are to meddle with the cause, Warrain was here Plaintiff in the Cause where Judgment was given, and the Bill of Chancery was inter Henric. Comit. de Oxon Plaintiff, and others Defendants; if they receive any hurt there, they may then pursue the Book of 9 H. 6. and have an Action upon the Statute; if the Bill there be for the same cause, we would then bail him: But it doth not appear here unto us judicially this Bill to be so: And the Rule then is this, Non refert, quid notum sit judici, si notum non sit in forma judicii: There is no Act of Parliament which prohibits any thing, but the party grieved may for his remedy have his Action grounded upon the same Statute, and so is the Register, inter brevia super Statut. where a thing is done contrary to a Prohibition by Statute, the party grieved may well there have an Action upon the same Statute, where the Judges cannot otherwise aid him, and this may be observed for a rule.

It appears not here unto us by any thing in this return, that this Bill there exhibited against him, was for the same cause for which the Judgment here was given, and therefore we cannot now aid him; we are now to give our Judgments upon the return, as it is here before us, and not otherwise: The Bill there is between other parties, than the suit here was: The Count. de Oxon is there Plaintiff against others, and here Warrain was Plaintiff, and so it doth not appear to be the same Cause.

Dodderidge. We have power to see this Bill what it is.

Haughton Justice. The Bill is not to be shewed, pro non comparendo, the Decree there was for his Commitment, and this is good.

Afterwards by the Rule of the Court, the Bill was produced and read in Court, and the Cummin. Garden therein contained, is the same thing for which the Judgment was here given.

Coke. We have given our Judgment, and a Writ of Error is brought, therefore Execution to stay, and this is just.



If they do not shew another Will between this and Friday next, then in this Case I shall do my Conscience, and in the interim we will confer together upon it, and afterwards we will herein do our Consciences.

If one doth disseise me of Land, and builds a House upon this Land, I shall have a Judgment for this, and he is not to go into the Chancery to be relieved for this; no more shall he to do in this Case, for in such Cases the Rule of Law is this, (S) Caveat emptor.

Dodderidge. As to our Judgment formerly given here in this Case, there never was any learned man (if he were an honest man) that was of another Opinion than we were of, in the giving of this Judgment (unless he was a timeserver.)

And so there was no further debate at this time of this matter, neither was the same ever moved again.

*Vaudry Plaintiff against Pannel  
Defendant.*

A Prohibition  
to Chester.  
1 Ro.Rep.246.

**I**n a Prohibition moved for by Sir Laurence Hide, to be granted unto the County Palatine of Chester.

Dodderidge Justice. Can you have a Prohibition to a County Palatine? there breve Domini Regis non currit, they there have Courts within themselves for to redress all matters: If they do err there in point of Equity, the way to remedy this, is to go before the Chamberlain.

The Court inclined to be of Opinion at this time, against the granting of any Prohibition in this Case.

13 E. 3. Fitz.  
tit. &c.

Afterwards at another time this matter was moved again, and 13 E. 3. Fitz. tit. Prohibition, placit. 11. was cited for the ground of every Prohibition.

Coke Chief Justice. The Kings Bench of Ireland is subject to be controul'd by this Court: If one be turned out of his Freehold by the Court of Chester, hath he no remedy for this? no Error certainly; he ought to have Justice done him in some place or other.

Dodderidge. I do not remember any motion ever made for a Prohibition, to stay proceeding in the Court of Chester, for there breve Domini Regis non currit: they have there several Courts to redress their Errors, if they do err, and the Bishop of Durham may reverse his own Judgment if he do error; if he do err in Law, a Writ of Error lieth here; and if we do reverse the Judgment, the Judge is to be fined for the same.

Coke. A Writ of Error lieth here upon a Judgment given in the Stannary Court, and so is Dyer, and all the Fooks, go to Presidents: To appeal to the Warden, and if they like not of him, then to the Lords of the Council.

Dodderidge. This was so when there was no Duke: But if there be a Duke, then to appeal to him: But I have never heard of any such Writ of Error brought, and therefore the Judges use to confer about this, they use to appeal to others, if they like not the former Judgment.

Coke. They are certainly to have remedy in one Court or other: and this Court hath the survey of all other Courts, the Kings Bench in Ireland is subject to be controul'd by this Court, where there is cause: This is a great and leading Case, we will therefore be well advised herein: And so for this time, without saying any more, it was adjourned to a further time.

Termin. Hill.  
13 Jac. &c.

Afterwards, (S) Termin. Hillar. 13 Jac. B. R. this Case was moved again by Sir Laurence Hide the Queens Attorney, for a Prohibition, and to enforce it,  
Trin.

Trin. 13 Jac. B. R. between Davis and Jones. A Prohibition was granted by this Court, to the great Sessions at Denbigh, and that the last Term a Prohibition was granted into Wales, and therefore prayed to have a Prohibition to the County Palatine of Chester.

Trin. 13 Jac.  
B. R. &c.

Coke Chief Justice. By the Statute of 27 & 34 H. 8. Wales is made parcel of this Realm of England, and therefore a Prohibition may well be granted thither: But as for Chester, where breve Domini Regis non currit, if my Predecessors have not granted this here, neither will I do it.

Stat. of 27 &  
34 H. 8.

A County Palatine is an exempt place, and by the general rules of Law, breve Domini Regis ibi non currit, but come you in, and we will advise well of this, and see the Presidents in this Case how they are: The County Palatine is not like unto Wales.

At another day this being moved again.

Coke. As to the Jurisdiction of Chester, and Prohibitions to be thither granted, Hillarij 11 Jac. in Cancellaria, in a great Case there between Sir John Egerton Plaintiff, against the Earl of Derby and Kelly: The Earl of Derby was Chancellor of Chester, and was also party to the Suit there in question, between Egerton and Kelly, the same being for a Lease: He having this Lease, Decreed there the possession of this Lease for Kelly, so that he was here Judge of his own proper Cause, and made the Decree in effect for himself, being for Kelly; with which Decree, Sir John Egerton finding himself grieved, being thereby put out of Possession, exhibited his Bill here in Chancery against them, for to have redress.

Hill. 11 Jac. &c.

To the hearing of which Case, I and my Brother Dodderidge were called, where Dodderidge did cite the Case of 18 E. 2. Fitz. tit. Assise, placito 382. where in an Assise of Novel Disseisin brought against &c. the Writ of Assise was directed to the Sheriff of Gloucester, and this was de libero tenemento in Gours; the Assise did pass before Sir John Gouens and his Companions, Justices assigned to take the Assise in the Marches of Wales; the same passed against the Tenant, who brought a Writ of Error, and assigned for Error, because the Writ was directed to the Sheriff of Gloucester, a Sheriff of England, and the Tenements put in view were in Wales; also that Gours is out of the power of the Sheriff of Gloucester, by reason whereof he could not execute the Writ: Also the Statute is, that Assises shall be taken in their Counties, and Gours is no County. Also the Writ is, de libero tenemento, in ville or in hamel, and Gours is neither villa nor hamel, but is all a whole County: Scrope there answers to all, that Gours is a Barony in the Marches of Wales, and that every Barony in the Marches hath a Chancery, and their own Writs; and where one of his Tenants doth wrong to another, he shall do him right: But when the Baron is ousted of his whole Barony, he cannot have remedy by his own Writ, because he is ousted of all.

Trin. 18 E. 2.  
&c.

And therefore it is ordained in Parliament, That when a Baron is ousted of his whole Barony, in the Marches of Wales, that he ought then to go to the King for to purchase his remedy, and to have a Writ in the Kings Court of Chancery, and the Writ shall go to the Sheriff of the next County, so that the Sheriff of Gloucester did serve the Writ, because that he was the next Sheriff; and so for this cause the Judgment was affirmed.

And 13 E. 3. Fitz. tit. Jurisdiction, placito 23. In a Writ of Cousinage, and demanded the Castle of K. and the Commote of J. (this being parcel of a Shire in Wales, as a Hundred there) it is there said, that the Castle was in Wales, where the Kings Writ non currit, and so to oust the Court of Jurisdiction.

13 E. 3. Fitz.  
tit. &c.

It is there said, that the Castle and Commote were in Wales, answer made, that this should not oust the Court of Jurisdiction: For by a Commote they demanded a great Seignory, as Lands, Services, and Rents, and this Castle and Commote

Commote were held of the King in chief, as of his Corone; and that these Castles which were thus held of the King in chief, as of his Corone, shall be pleivable here, and not else where, &c. And in this great Case in Chancery, we were of opinion, that proceedings might be here in Chancery in the same Cause. Afterwards, the Lord Chancellor did agree with us in opinion; and so the suit went on in the Chancery here, after the Decree passed in the Chancery at Chester. Also it was there resolved, that a man inhabiting out of the County Palatine of Chester, hath right to Land lying in Chester. That for this, he may sue in the Court of Chancery here; for he ought to have means to come unto his Right. But here we are out of this matter of equity.

13 Eliz. Dyer,  
not printed,  
11 H. 8. &c.

13 Eliz. Dyer, (but not in the printed Book.) A diem clausit extremum, recognoscible in the County Palatine of Chester, 11 H. 8. Kellaway, fol. 202. a. b. where it is said, that the Isle of Man is no parcel of the Realm, neither do they there use the Laws of the Land. It is like unto Tourney, when the same was in the Kings hands. And unto Normandy or Gascoigne, which are meerly out of the power of the Chancery.

The Isle of Wight was by Act of Parliament made parcel of the County of Southampton. As Wales and Ireland made parcel of England. And a Writ of Error lieth here, for erroneous Judgments given there: But otherwise it is for erroneous Judgments given in the Isle of Man, in Gascoigne, or in Calice, because they are not parcel of this Realm.

Mich. 42 &  
43 Eliz. &c.

Also, if a Court of equity, in case of equity, do wrong to a party, by their Decree made against him. He is not in this Case without remedy, for he ought to sue unto the King by Petition, who may give unto him redress by his Judges, referring the matter to them. And this was a great Case between Sir Moyle Finch, and the Lord of Worcester, and others, Mich. 42 & 43 Eliz. where the Earl of Worcester and others, upon a Feoffment were seized to the use of a Noble Lady, (S) the Lady of Southampton. The Earl was Plaintiff in the Chancery on the behalf of the said Lady, against Sir Moyle Finch, which suit was concerning the Manors of Raimesthorne and Stoke-Goddington. The Decree in Chancery was for the Earl, and against Sir Moyle Finch, with which Decree he found himself much grieved; and upon this, he preferred his Petition unto Queen Eliz. to have some redress. The which matter she referred to her Judges. And by them the said Decree was reversed.

And so in such a Case, the sole and proper remedy is to go, and as in that Case, to prefer a Petition to the King. And if he will, he may refer this matter to his Judges; and so by them (as in the former Case) it was done, (if there be cause for it) the Decree made, may be by them reversed.

And this was so set down, and agreed upon by all the Judges, under their hands. That the Lord Chancellor is not to meddle there in Chancery, after a Judgment at the Common Law, and the same affirmed in a Writ of Error; and yet there may be equity as in that Case, being in Case of a Mortgage; he by whom the money was lent to be paid, for the redemption of the Land, was by the way robbed of the money; but yet the same was paid presently after, but at the Common Law, he is barred, and this was the principal Case.

It was also resolved in Kelleys Case before remembred, That one may lay a transitory Action in what County he will, as if one be beaten in a County Palatine, he may lay his Action where he will.

Where a man is wronged by a Decree, his best and only way to have remedy, is by his Petition to the King, and so here in this Case you ought to make your address to the King by your Petition; and so he may then refer this to his Judges for your redress herein. Here you are in a Case of equity; and a Decree is made against you; you may now do, as in the Case before of the Earl of Worcester; and this is that which I have observed, as touching the County Palatine of Chester.

Sir



Sir Henry Warner Plaintiff, against Suckerman  
and Coates Defendants.

**I**n a Prohibition to the Court of the Dutchy; because they there go about to question the validity of Letters Patents, granted to Sir Henry Warner, of the Manor of Milney in Comitatus Suffolke.

A Prohibition  
to the Dutchy  
Court.

1 Ro. Rep. 252.

1 Ro. Abr. 381.

2.

2 Ro. Abr. 317.

8.

George Croke, For cause of a Prohibition shewed, that heretofore (S) in 43 Eliz. the Court of Dutchy did then think this matter to be fit for a Trial at the Common Law, and accordingly we had a Trial at the Common Law; and adjudged for Sir Henry Warner; and upon a Libel formerly against them for Tythes, and adjudged against them; and now by a new Suit in the Dutchy Court for the same matter, and by the same parties, and there would question the Letters Patents to him granted, which is a cause for a Prohibition. The Case formerly was this (S) Upon a Libel for Tythe-Pay against Coates and Suckerman, they prayed a Prohibition, because they were under-tenants to the Abbot of St. Edmonds-Bury, who prescribed for himself, his Freeholders and Occupiers to be discharged of payment of Tythes, and shews that he was a Freeholder of the Manor, and had Common of Turbarry there, they were held not to be within the prescription of discharge, being no Freeholder, and so by this Court a consultation was then granted for Sir Henry Warner. And now they begin in the Dutchy Court again, and there seek to avoid the Letters Patents; and therefore prayed a Prohibition.

Against the Prohibition, it was urged by—

Sir Robert Hitcham. That the Proceedings in the Dutchy Court is meerly as an Information for the King: that Sir Henry Warner had a grant of the Tythes by Queen Mary before the suit for Tythe-fodder; that such a kind of Tythe is not used to be paid in Suffolke nor in Cambridgeshire, which the Queen had pro bono publico.

Coke Chief Justice. An Abbot may prescribe for himself in Non decimando, But to prescribe for himself and for all his Freeholders in non decimando, clearly this Prescription is not good.

Dodderidge Justice. What equity can be there suggested against the payment of Tythes? it is against the Law of God not to pay them.

Coke. Tythes are due jure divino, mes quota pars jure humano. The Patent granted to Sir Henry Warner had relation to matters before granted by Queen Mary; how will they avoid this Patent in the Dutchy Court? if none to pay Tythes of this, then the Patent is void.

Dodderidge. There can be no equity against the payment of Tythes; but there may be a Prescription, which is matter of Law.

Coke. This Court hath power to prohibit them. And so to prohibit all other particular Courts, which do hold plea, by reason of their particular Jurisdictions, or if they have a general Jurisdiction by Act of Parliament, if they do exceed their Authority, they are by the Common Law to be prohibited by this Court. And so if a Court-Baron do hold Plea of a sum above 40 s. to be prohibited by 19 H. 6. and Fitz. Nat. Brev. A Prohibition is to be granted by this Court; quia placita &c. where they hold Plea of a thing which belongs not to them, then a Prohibition is to be granted, (S) vobis prohibemus quod, &c. By the Register; If a Corporation holds Plea of any matter out of their Jurisdiction, then vobis prohibemus, quia extra Jurisdictionem. And so of the Court of Marshalsey. This Court is to curb them also. And this so by the Common Law, That all particular Courts, either in respect of the place, or of the Causes to be there determined, if they do exceed their Authority, they are by the Common Law to be prohibited by this Court, being

Prohibition to  
a Court Baron.  
19 H. 6. Fitz.  
Nat. Brev.  
Register.  
Prohibitions.  
To a Corpora-  
tion.

To the Ex-  
chequer.

To a Justice  
of Assize.

Stat. of 2 H. 5.  
To the C. B.

being a particular Court, erected for particular purposes. It appears by the Register, A Prohibition granted by this Court to the Court of Exchequer. If they hold Plea of Common Pleas without a Writ of Privilege, as appears inter breviam de Statuto, if deal against Statutes, Prohibition to a Justice of Assize to be granted, quia magna indiget examinatione; this is the Act of Parliament.

And so if the Judges in the C. B. do hold Plea of an Appeal, a Prohibition is to be granted by this Court, as Register; The Statute of 2 H. 5. by which a Libel is to be delivered to the party, where need shall be, where a Statute doth prohibit malum prohibitum, to be prohibited.

We here in this Court may prohibit any Court whatsoever, if they transgress and exceed their Jurisdiction. And there is not any Court in Westminster-Hall but may be by us here prohibited, if they do exceed their Jurisdictions, and all this is clear, and without any question.

Here in this principal Case you are not to go into the Dutchy Court, and there to examine the validity of this Patent made to Sir Henry Warner. There is no equity against the Law of God; and there is no reason, but we ought here to prohibit them in this Case: for they have there no Jurisdiction to meddle with the validity of these Letters Patents, as now they would do. And if they will not walk within their proper Limits and Jurisdiction, we will here prohibit them. As touching these matters, complaint was made by them to the King of me, when we in this Case were before agreed to grant a Prohibition, but before this was granted, they complained to the King; and I then before the King did justify our proceedings, and that we well might grant a Prohibition in this Case. The King then said unto me, that he was well satisfied herein; and he then said further unto me, do you Justice, and bring in no Innovations.

Croke Justice. This Writ of Prohibition, it is Breve Regium & jus Coronæ, and if this Writ shall be denied in such Cases, this would then be in Lætionem, exheredationem, & derogationem Coronæ; where any Court comes to be exorbitant, in their proceeding we have Sacramentum that lies upon us, not to suffer any Encroachments by any Court.

Term. Trin.  
12 Jac. B. R.

Dodderidge. It is a part of our Duty to maintain our Judgments here given, and this is no Innovation; and so I shall ever do. A Consultation hath been here granted by us in a Prohibition upon a Libel for Tythes, Termin. Trin. 12 Jac. and between the same parties. And you now in the Dutchy Court do suggest matter of equity; but what this matter is, the same is unknown to us. They are not there to judge upon the validity of these Letters Patents; whether these Letters Patents be good or not, this is to be determined by the Common Law, and not to be there tried in point of equity.

Haughton Justice. Nothing is here shewed unto us to give Jurisdiction to the Court of Dutchy of this Cause. If it be touching the natural right of Tythes, this then properly belongs to the Spiritual Court. If it be touching the validity of the Letters Patents, this is not to be tried there. And we ought to maintain the Judgments of this Court. And the Court there formerly made orders for them in this Case, to go to the Common Law. And now they fall from this again. It hath been here formerly adjudged by us for a Consultation to the Spiritual Court. And no cause there is here to suffer this proceeding in this Case in the Dutchy Court. And therefore a Prohibition ought to be granted.

Coke. We are here agreed, not to suffer our Judgments here given, to be shaken, but by an Act of Parliament. And all Counsellors hereafter are to be take heed how they do advise any of their Clients to go into Courts of equity, after a Judgment given here in this Court; and he which is præmonitus, is præmunitus. This is said as a Caveat, ne forte, an example be shewed on them.

A Prohibition  
granted per  
Curiam.

The whole Court agreed, una voce, nullo contradicente, for a Prohibition. And so by the Rule of the Court, a Prohibition was granted.

Jones

*Jones Plaintiff against Stenor  
Defendant.*

**I**n an Action upon the Case for trover and conversion. Sur non culp. pleaded, a Verdict for the Plaintiff. Harris Serjeant moved in Arrest of Judgment, that in the Venire facias a Juroz was named Harewood, in the distress and jurati he was named Harwood, and so for this variance he prayed a Venire facias de novo, this being like another Case here adjudged, where in the Venire facias a Juroz was named Swift, in the Distingas and jurati named Swift, and this was here resolved to be bad.

A Trover and  
Conversion.

The whole Court agreed in this, that where there is an S. for an F. this is bad clearly; for they have not the like pronunciation, and therefore this is apparantly bad.

Croke Justice, Baxster and Baxter, this is all one.

The whole Court agreed this to be no variance. For that Harewood and Harwood idem sonant, and they are all one. And so by the Rule of the Court Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff.

*Gough Plaintiff against Howarde  
Defendant.*

Entred Trin. 12 Jac. B. R. Rot. 832.

**I**n an Action upon the Case for a Rescous, the parties were at issue, and upon the trial, a special Verdict was found; upon the Verdict, the question did arise upon the construction of Butlers Will. The Case hereupon appeared to be this, John Butler being possessed of a Lease for 28 years of two Tenements, in the Parish of Saint Saviours in Southwark, the one of them in his own occupation, the other in the occupation of another, makes his Will, and by this doth devise both these Tenements unto Elinor his Wife for the whole term, if she shall live so long, and remain a Widow, and not married; and if she do marry, Then he devised to her only his dwelling House, and also 20 l. rent per annum out of the other house, not mentioning what estate she should have in the rent; whether she should have the same during the continuance of the term, (the which he had before disposed of) or whether she should have this only for her life (if the term so long should continue.) Of this Will he made his Wife his Executrix, and died; she enters as a Legatee, and afterwards takes to Husband the Plaintiff, and dies; the rent is behind, and he coming to take a distress for this, Rescous was made, upon this the Action brought.

An Action  
upon the case  
for a Rescous.  
Bridg. 52.  
1 Ro. Rep. 247.  
1 Ro. Abr. 610.  
620.

These matters at the Common Law moved in this Case to be considered of.

Points in the  
Case.

1. First, Whether here be any good rent at all at the beginning?
2. Secondly, Whether here be any sufficient agreement, to take this as a Legatee? If this be so. Then—
3. Thirdly, How long this rent shall have continuance? whether during the life of Elinor, or during the 28 years?

This Case was argued at large this Term, and in Termin. Pasch. 14 Jac. B. R. by Heath and Thorne, Crew for the Plaintiff, and by Coventry and Noy for the Defendant.

After which Arguments, the Judges delivered some Opinions touching the sever-



ral Points moved in the Case, and Termin. Pasch. 14 Jac. B. R. this Case was argued by all the four Judges.

34 Assisar.

Dodderidge Justice demanded of Coventry, Whether he thought this Rent to be extinct or suspended, 34 Assisar. the Father seized in fee of Land, had issue two Daughters, he grants a Rent-Charge to one of his Daughters in fee, and dies; the Land out of which the Rent was granted, did descend unto the two Daughters, so that they had as great an estate in the Land, as the one of them had in the rent; partition is made between them; after this the Rent shall be revived, the same not extinct by this. Here the Rent granted is but a possibility, (S.) if she marry. So that she hath an election, whether she will marry or not, and until she doth marry, she is to have the whole Lease; but after marriage, then the election is to be, and then this Rent is to have commencement, and no extinguishment of this before. If a man devise a Rent to another, and afterwards makes him his Executor, there this Rent shall be extinct. But where he doth devise the term to one, and a Rent out of this to another, and afterwards makes him to whom the Rent was devised, his Executor, he may now elect to have this as a Legatee. 2. It hath been said, that it is impossible for him to give his consent, this is not so; for he may very well consent unto this, if a Rent be devised to one out of a Lease, and the Lease to another, if he assent first unto the Rent, this he may well do, and if he assent that the Devisee shall have the term, clearly this is a good assent to the Rent for to charge the Devisee of the term with this Rent, for he assents to have the Land charged with the Rent. But the assent to the devise of the Rent is no assent to the devise of the term; and this is clear, and it is as clear that an assent to the devise of the term is an assent to both.

Croke Justice. It hath been said, that he cannot devise the term to one, and a Rent out of it to his Executor; this is not so, for the Law by construction shall make this which ought to be last to be first, and that which ought to be first to be last, and that so this to be a good devise of the Rent to the Executor.

Haughton Justice. The chief matter here appears, that she is to have it but for life.

This Case was at another time in this term moved again, and argued by George Croke and Bridgman.

Coke Chief Justice. As large an Estate as she hath in the Rent, she hath also as large an estate in the distress; as to the pleading and the exceptions taken to it; this ought to be possessionatus. As to the matter in Law, being what estate she shall have in the Rent, I will not at this time deliver any resolute opinion therein.

Dodderidge. One hath a Lease for years, he grants out of this a Rent to J. S. and limits no estate in the Rent.

1. This is a Chattel out of a Chattel, he can have no Freehold, he shall have this for all the term, if he lives so long.

Coke. He shall have the Rent during all the term; for this gift shall be taken strongest against the Donor, and shall not determine by his death, (if the term hath continuance) but after his death his Executors shall have this during the residue of the term. But if one do grant a Rent out of his Land to another, and limits no estate in this Rent, he shall have this Rent for his life.

Dodderidge. If one grants a Rent to another, without saying any more, this shall be for life, but if he goeth further, and says that his Executors shall distrain for this for ten years, by this it shall only be a Rent for ten years; and this is warranted by 5 Assisar.

Coke. I do agree this to be so, for this is an explanation of his meaning.

Dodderidge. Here he did never intend that a second Husband should have this, but that the same should be determined by the death of the Wife.

Haughton. We ought to expound the words by the whole Will, (and also such a Rent) the exposition of a Will ought to be by coupling the later clause with the former

former (and also) and therefore she to have this Rent for all the term.

Coke. I incline to be of the same opinion, but if he had devised the Rent to her without such a clause, it had been otherwise.

And so without any further debate at this time, it rested upon a Curia ultarius advisare vult.

Afterwards (S) Termin. Pasch. 14 Jac. B. R. this Case was moved again, and Term. Pasch. argued by Thomas Crew for the Plaintiff, and by Mr. Noy for the Defendant, and 14 Jac. B. R. afterwards by all the Judges.

Coke Chief Justice. Two Points have been moved in this Case, and all of us have clearly over-ruled one of them, (S.) for the assent unto the second devise of the Annuity; that an assent unto the first part of the Will is an assent unto all, to all the Will, and to all which is therein contained, and this we hold clear, and without any colour of question.

And as to the Exceptions taken to the Declaration, we have over-ruled them all to be bad, and of no force.

But as to the first Point, This for the generality of this Case, I have known this to be formerly adjudged, That if one hath Fee-simple Land, and doth devise this unto his Wife generally, by this devise she hath but for her life.

Also if one hath a term in a House and Land, as in Black-acre, if he deviseth this to one generally, the Devisee by this general devise shall have the whole term.

Also if he doth devise a Rent out of this generally, by this the Devisee shall have the Rent during the whole term, if he lives so long; and all these Cases are very clear.

Now whether in this Case here there shall be any thing in this Will by way of retraction from the first devise (as to the having of an Annuity?) this is the question here now only considerable, and as I think she shall have this Annuity during the whole term to come; we are not to detract from, nor yet to add any thing to the Will.

Croke Justice. That which is here, is to be by way of detraction.

Dodderidge Justice. If I have a Lease for years, and I do grant the term, this shall be for all the term; but if I do grant a Rent out of this to one, this shall be for his life, if the term shall so long continue.

Afterwards at another time—

Haughton Justice. The question here ariseth upon the parts of Butlers Will, who was possessed of a Lease for years of two Messuages, made his Will, and by this he did devise both of them unto Elianor his Wife for the whole term, if she lived so long, and remained unmarried; but if she happened for to marry, then he devised to her his dwelling-house during the whole term: And also I devise unto her an Annuity of 20 l. per annum out of the other House, without limiting what Estate she shall have in this Rent, and then deviseth this House to another Butler his Nephew.

Also there being a Proviso in the Will, that if the Annuity be not paid unto her, but be in arrear, that then it should be lawful for her and her Assigns into the said Messuage to enter and distrain, and to detain this Distress until she be satisfied of the said Rent; afterwards he makes his Wife his Executrix, and dies, she proves the Will, enters as a Legatee, afterwards takes the Plaintiff to Husband, and dies during the term, and then for Rent behind Gough the Plaintiff distrains.

The only Point here is, Whether Gough the Plaintiff hath any Interest in him, so that he may distrain for this Rent? As this Case is, he hath a good Interest in the Rent, and therefore Judgment ought to be given for him.

In this Case, for the true construction of this Will, the course and substance of this Will doth very plainly demonstrate the intent of the Testator as to these his two Messuages: If she do not marry, then she to have all, but if she do marry,

then for his dwelling-house ; it is clear, that she shall have this for all the term : But as to the Rent limited to her out of the other house, this is not so plain, the same being generally without limiting what Estate she should have in this.

The general scope and purpose of the Will here doth consist upon two parts : And the first part of the Will here doth declare his purpose and intent, in the later part of the Will, which is, that he should have the same Estate in the rent, as he had in the house limited unto her in the first part of the Will, for here there is a dependency of the one upon the other ; and the second clause doth necessarily depend, and ought to be expounded by the former, the same being all for the provision of the Wife after Marriage.

Trin. 20 Eliz.  
C. B.

And to this purpose there hath been a good Case put at the Bar, which was cited to be, Trin. 20 Eliz. in the C. B. where a man did devise Black-acre to his eldest Son and his Heirs for his part, and White-acre to his younger Son for his part (and omits to him and to his Heirs) yet this shall be also to him and to his Heirs, because the same hath dependency upon the former devise, and in the construction of this, it shall be guided by the same.

For the true understanding of this Point here : If this clause had been single of it self, without any dependency on the other clause : As if a Termor for years deviseth a rent out of this term unto his Wife generally, what Estate this shall be, if it had been so ; Whether this should be for her life, or for all the years ?

If this had been the single Point : In this Case, for my opinion I hold, that she should have this during the term, if she so long should live ; this should be for her life, if the term so long continued, and this should be determined by her death ; notwithstanding the term had continuance, there she should not have a greater Estate than for her life.

The reason of a general Libery is this, because the Deed of every man shall be taken strongest against himself : But there is no such reason in the Case of a Will, for there we are to judge according to the words ; and to collect and gather the intent of the Devisor out of the words of the Will.

And so if the clause here had been solely of it self, and without any dependency on the other part, there by a reasonable construction this should be for life.

I agree, that the term generally taken, includes the whole term : If it had been so that the Devise had been only to her, and to continue for her life (being not to her and her Assigns) and notwithstanding the addition of the clause here in this Will, That if it be behind, that it shall be lawful for her and her Assigns to distrain for the same ; this shall not enlarge the first Devise, (if this had been a distinct and a several Clause of it self) but in this principal Case here it is otherwise.

For here are two clauses in this Will, and the later clause for the Rent hath a dependency upon the former, and for this reason I do hold, that here she shall have this Rent during the continuance of the term to come ; so that after her death, though the Plaintiff her Husband hath a right and good Interest to have this Rent, and the distress by him taken for it is lawful, and the rescous illoyal : And so Judgment ought to be given for the Plaintiff.

2. Dodderidge Justice. To the contrary, that Judgment ought to be given for the Defendant : That this Rent here shall determine by the death of the Wife, and therefore the Plaintiff here to recover nothing.

As to the words of this Will, which are as before ; upon which words of the Will, the question here is, What Estate the Wife shall have in this Rent by this Will, limited so generally unto her, without any certain limitation of any Estate.

In this Will we ought to search out the intent of the Devisor, what this was.

First,



First, It hath been agreed unto me, that if the Case had been so, and without any other Circumstance: That if Tenant for years grants a Rent to another out of his Land by Deed, that this should be for years, but determinable with his life; and so it should be in case of a Will, as it hath been agreed: This here only depends upon the intent of the Testator himself: And by this Will his intent appears, that he did intend a greater benefit unto his Wife, if she remained unmarried, than he did that she should have if she did marry.

If she did not marry, then she was to have both the Houses, but if she married, then she was only to have his dwelling-house, and an Annuity of 20 l. per annum out of the other House, and this Rent was to have an end by her death; for he intended the one to be more beneficial to her than the other.

If she did not marry, she then was to have the greater benefit by the Will, but if she married, he then intended to be less liberal unto her.

And this by way of restraint; for if she marry, he then doth countermand his Will, as to one of the Houses: And in lieu of this, he gives some recompence to her, (S.) an Annuity of 20 l. per annum out of this other House, the which he intended to be less beneficial for her.

Now to examine the words of this Will, by these she is not to have this Rent any longer than for her life, if the term continues so long; if she dies, then he intended with this House for to advance a Kinsman, (S) Thomas Butler his Nephew: And this purpose of the Devisor here directs me this way in my Judgment.

Now to come to the restraint it self being this, (S) If she marry, then, &c. He to have his dwelling-house for her habitation, and the Rent for her maintenance, and this for her life (if the term continue) there being here no Estate limited in certain, how long she should have this Rent.

As to the construction of such general Grants, without any limitation of Estate.

As touching this, four Circumstances are to be regarded by the Law. (S.)

1. The Law will always have a regard to the Estate of the Grantor, so that such a general grant shall not be of longer continuance than the Estate of the Grantor. As if one be seised of Land in fee, and grants a Rent to another out of this Land, without expressing any certain Estate, the Grantee shall have this for his life, as appears by 7 Affisar. placito 1. & 17 E. 3. fol. 45. And so if Tenant in tail grant a Rent-Charge out of his Land, without expressing what Estate, the Grantee shall have this for his life (but yet with this limitation) to be determined by the death of Tenant in tail.

Four Circumstances touching Grants.

7 Affisar. placito 1. &c.

If the King by his Letters Patents grants a Rent unto another, without limitation of any Estate, this shall be but at will where it is in the Kings Case, for this shall be taken most beneficial for the King.

If Lessee for years grants such a Rent, not limiting any Estate, the Grantee here shall not have any Freehold, because this is derived out of a Chattel, but he shall have this for so many years as the other hath in the Land; if the Grantee so long shall live, as appeareth in Plowdens Commentaries, fol. 524. in Welkdens Case; he cannot grant this for any longer time than he himself hath it.

Plowdens Commentaries, f. 524.

As if Lessee for years grants a Rent out of his Land for the life of A. he shall have this for such a time if the Lease continues, but not otherwise; for the Law, for the true construction of such Grants, hath respect to the Estate of the Grantor.

2. The Law hath respect to the ability of the Grantee, and this sometimes shall rule and direct the Grant, where no Estate is expressed: As a Grant made to an Abbot and Convent, without saying any more, they have a Fee-simple, by 11 H. 4. fol. 84. and so if a Grant be made of Land to a Pastor and Community, they have a Fee-simple, by 11 H. 7. fol. 12. and so if it be to a Dean and Chapter, they have a Fee-simple, by 27 H. 8. f. 15.

3. The

3. The Law sometimes hath regard to the consideration which leads the estate. As a devise made of Land to one paying 100 l. this shall make a Fee-simple, by 29 H. 8. Brook, title Testaments, placito 18. & 4 E. 6. Brook, title Estates, placito 78. And so it is in Case of a Bargain and Sale of Land for money, without limiting of any estate, he shall have a Fee-simple, because of the consideration, by 27 H. 8. fol. 5, 6.

4. The Law also sometimes respects the recompence and loss which is sustained. As if Lessee for twenty years makes a Lease for ten years, rendering Rent, and no time for the continuance of the Rent, expessed by construction of Law, the same shall have continuance during the ten years, because the Rent is the consideration for the term.

And therefore in 39 E. 3. fol. 1. If Tenant in Dower doth exchange the Land which she hath in Dower with the Reversioner for other Land, and no estate expessed for what time she shall have this Land, there ruled, because the same was given in exchange for her Dower, in which she had an estate for her life, and having lost this, she shall have the same estate in the Land exchanged, as she had before in the other Land; and so it is ruled also in 2 H. 7. fol. 5. and 15 H. 7. fol. 14. Two Coparceners, Tenants in tail, make partition, in this more is allotted to the one than the other; and therefore a Rent is granted for equality of partition, without limiting what estate she should have in this Rent there ruled, that she should have such estate in the Rent as she had in the Land with which she parted, 15 H. 7. fol. 14. If three Coparceners be, and they make partition, one of them grants twenty shillings to her two Sisters for equality of partition, there by Frowick and Vavifour this Rent shall be in the nature of Coparcenery, and by the death of one the Rent shall not survive, but shall ensue the nature and course of Coparcenery. So that in such general Cases, the Law is the best Exposition.

2 H. 7. c. 5.  
15 H. 7. fol. 14.

Now as to the Case here of a Will, First he advanced his Wife with all the term in both the houses, (if she should live sole) but if she married, then he devised but one (S) his dwelling-house unto her absolutely for the whole term, with a Rent only out of the other house. I agree with that which hath been said, (S) If there had been but one clause in this Will, That she should have one house, and a Rent out of the other generally, that there she should have this Rent for such time as the Devisor himself had in the Land. But here in this Case there are two several clauses, having no manner of dependency the one upon the other, but are in themselves several.

The first clause being a devise unto his Wife for all the term in both houses, if she do not marry.

The second clause, (S) if she do marry, Then, as before it is expessed. Then, this is a new devise of the dwelling-house to her absolutely. And then also I devise to her an Annuity of 20 l. this is a new devise by it self, having a new verb. So here are two clauses, and new devises. I will and devise to her, this shall not go beyond his limitation. If he had said, if she marry, I devise unto her a Rent out of a house in which J. S. did dwell, this shall be a Chattel determinable upon her death.

As to the matter subsequent in this Will, that if it be behind, it should be lawful for her and her Assigns to distrain.

This Distress thus limited to her and her Assigns, shall not enlarge the former Estate to her devised.

19 H. 6. 22 H. 9.  
f. 15.

19 H. 6. and 22 H. 6. fol. 15. If Land be given to two & heredibus, with warranty to them, & heredibus suis, adjudged that this doth not enlarge the Estate.

31 H. 8. Brooks  
Cases, f. 35. & c.

And so is 31 H. 8. Brooks Cases, fol. 35. placito 156. Brook title Estates, placito 4. So here in this Case, where there is a former Estate limited by this Will; this addition in the Distress, for her and her Assigns, shall not any ways enlarge

large her estate; no more than in the Case of the warranty before. But if the words of the Will had been, (And also I devise to her an Annuity of 20 l.) there she shall have such an estate in this Annuity as she had in the first house to her devised. But here in our Case it is not so, for here are two several Devises. And his purpose here was to restrain and abridge her if she married, which cannot be, if by such a construction as hath been made she should have this Rent for all the term. For then by this means her estate should be as great, or greater than the same was before; which doth not stand with the intention of the Testator by this his Will; and for this cause this Rent shall determine by her death. And so the Plaintiff hath no right to have this; and therefore Judgment ought to be given against him for the Defendant.

2. Croke Justice. In this Case Judgment ought to be given for the Defendant. By the first part of this Will here, the Wife is to have all, both the houses, and that for the whole term, but this with a restraint, if she should live so long, and unmarried. But if she marry, then otherwise.

Here the Plaintiff had no cause to distrain for this Rent, the continuance of this being but during the life of the Wife. I agree to this also which hath been said before, that she hath this with a condition tacite annexed unto her estate; she shall have this for all the years, if she lives so long; and her estate shall be determined, if she dies within the term; this is to be so, if in case of a Rent-Charge granted out of a term for years; this is to be taken pro concessio.

The point here in this Case rests upon the construction of this Will. And as to the due construction of all Wills, these three things are herein to be observed.

This to be observed in construction of Wills.

(S.)

First, Res. 2. Persona. Et 3. Tempus. For that Testamentum is but testatio mentis.

First, To observe, Dispositio rerum, quæ.

Secondly, Personis, quibus, and in this Will they are two, (S.) his Wife and his Nephew; and both these the Testator here had for his Object. To his Wife his devise was of the two Houses, so long as she should remain a Widow, and to continue his house and name. He devises to her both his houses. But if she marry, then he will adhibere correctionem testamenti, in the abridging of her former Estate, and this is correctio testamenti. Yet he deviseth his dwelling-house to her; whether she do marry, or not marry, this she is to have by the Will. But as to the other house, (if she marry) he will have another consideration for the disposing of this unto his Nephew. Yet his Will is, that his Wife should yet have quid pro quo. Not to lose all, but to have some recompence for this house which by his Will he takes again from her, and therefore for this he doth devise unto her a rent out of his house, in recompence for this house, he deviseth to her his dwelling-house absolutely for all the years to come, and the expressing of this certainty of estate in the first clause, and the omitting of this presently after in the clause next following, this is in a manner a negation, that he did intend the contrary, (S.) to have this to continue but during her life, if the years so long did last. Otherwise he would have added this, if he intended that she should have the same estate in the Rent as she had in the house, and because he doth not add this in his Will expressly, it is as much in Law as to say, that she should not have this rent absolutely for all the years. Like unto the Case remembred at the Bar. A man deviseth Black-acre to his eldest Son, to him and to his Heirs, and White-acre to his younger Son, omitting these words (S.) to him and to his Heirs) this omission is in Law as a direct Negation; that he should not have it in the same manner as the other had Black-acre, but otherwise it shall be, as I agree the case before remembred, where a man deviseth Black-acre to his eldest Son and his Heirs for his part or portion, and White-acre to his youngest Son for his part (omitting Heirs) that yet here he shall have it in the same manner as the other hath Black-acre. Here in this principal Case, this estate



estate of the Wife in the rent, shall determine by her death: otherwise this should be to offer violence to the Letter of this Will, and to the intent of the Testator, who did by this his Will intend upon her Marriage to abridge and lessen her estate. And so the Rent in this Case is determined by the death of the Wife, and the Plaintiff hath no right to have this Rent, and so Judgment ought to be given against him.

4.

Coke Chief Justice. This is an Action upon the Case for a Release of a distress: my drift is always, if by any means I can by the Law, to maintain the right for the blood of the first Purchaser, and I shall be glad to do this, so here in this Case of a Will, as in Cases of Purchases; But as this Case is upon this Will, I do hold that Judgment ought to be given for the Plaintiff, my first reason shall be upon what which before hath been observed.

Inferences for  
the true con-  
struction of  
Wills.

Three Inferences I have observed in Wills; and for the true construction of Wills.

First, There is Temeraria expositio; this is not to be allowed of, but the contrary.

Secondly, There is Probabilis expositio, and this is to be least.

Thirdly, There is violenta præsumptio, for to guide the exposition of this, and this is to be imbraced; and so by this to shew and to find out the meaning of the Testator, 21 E. 3. If a man doth devise Land to one for ever and ever, this is a fee-simple.

I do very well like of a violent, plain and perspicuous Exposition and meaning of a Will. But what is the reason objected to the contrary, It is merely a foreign exposition to say, that upon her marriage he did intend to give a greater or a lesser estate unto his Wife, this is a foreign exposition, and therefore to be avoided.

In this Will, and in the construction thereof, I will observe both the words precedent and subsequent; if marry, then.

I will also in this Will observe the two Adverbs of time, (then) In this Case the Wife by this devise to her, is to have an estate in the Rent absolutely during the continuance of the whole term to come; she hath now a greater estate by this second devise than she had before by the former; there being this limitation, (S) (if she shall live so long.) Marriage is lawful, Ordained in Paradise, and it is there said, Non est bonum homini esse solum, and therefore she is not to be punished by constructions of Law, for this her lawful Act. And because she hath married, shall we argue that she shall have a lesser estate (for this lawful cause) that she had before, this we are not to do. It is well said, Si à jure discedis vagus eris, and then omnibus omnia erunt incerta. Discretio est discernere per Leges, Quid est verum. And I dare not say, that here he meant to punish her if she married, by the abridging of her estate, first limited to her by this his Will. Then observe the words, during all the term, these words rule all. If marry, then, will during the residue of the said 28 years, these words spoken before he devised any thing to her. For he doth not begin in this manner (S) I devise my dwelling-house, but indennite he here begins with the limitation of the estate, quamdiu. And then also, when marry, to the same unity and indivisibility of the time devised to her his dwelling house and 20 l. per annum, then also, this is to be taken as in the same manner in a Will. 1. Devise 20 l. per annum of Rent unto her during the term; here it is in a Lease, this clearly shall go to the whole term; and this I will make clear, and iterating verbs in a Will work nothing. A man grants a Rent to one for life, and afterwards that he and his Heirs shall distrain for this: this limitation of the distress to him and to his Heirs shall enlarge the estate, and make it to be a fee-simple, and this without all question, by 8 H. 4. & 46 E. 3.

8 H. 4. 46 E. 3.

My first reason here shall be upon the composition of the Will, and upon this clause of distress, to her and her Assigns.

That

That she shall have this rent for the whole term to come absolutely. It hath been said, and in a manner agreed, That if a Woman for years doth devise a rent out of this unto his Wife, that she shall have this for all the term, if she lives so long, and that the same shall determine by her death. But I deny this to be so, as it hath been said. And first I will break this Case. If he devise two Messuages to his Wife, which he had for years; and if she marry, then he deviseth one of them to her, this shall be for the whole term, and this is *res judicata*, and so resolved by all expressly, in 14 Eliz. Dyer, fol. 307. a Term of a house for forty years deviseth this to J. S. without limiting what Estate he shall have, there per Curiam, the Devisee shall have this for the whole term; and the reason there given is, because he cannot have this for life, at will, nor for a lesser term, and therefore he shall have it for the whole term.

It hath been objected (that this is true) but with this limitation, (S) (if she shall so long live) I deny this, for it shall be for the whole term absolutely. And in such a Case, if he devised the Land to his Wife, this shall be for the whole term; and if she dies within the term, her Executors shall have the residue of this. And if it be so, where he deviseth the Land, by the like reason it shall be so where he deviseth a rent out of the Land generally, this shall also be during the whole term; for there is no difference between these Cases.

Now as to the Authorities to prove this which I have said.

10 E. 4. fol. 18. 27 H. 8. fol. 19. 21 H. 7. 11 Affisar. A Lease made for years, or for life, reserving rent generally, this rent shall go to his Heir, the Law shall so direct this; and the Cases before remembred, of partition made between Coparceners, and a rent allotted to one for equality of partition doth well prove this to be so; the rent to continue as long as the estate out of which the rent was granted; and this is according to the reason of the Law; the Rule being *ipse etenim leges cupiunt, ut jure regantur*, and with this agrees 2 H. 7. fol. 5. 15 H. 7. fol. 14. 22 Affisar. placito 78. Two Coparceners make a feoffment in fee, reserving rent generally, this rent shall be unto them as the estate in the Land before was.

And so is Shellys Case, 1 pars. If a rent be reserved generally, this shall go to the reversion; if this be left to the consideration of Law. But if the party will make a special reservation to himself, there it shall be otherwise, and not to be extended beyond the special reservation of the party; for there the words make the Plea, where the party speaks specially for himself.

Termin. Pasch. 27 Eliz. B. R. Constables Case, where one made a Lease for years, reserving rent unto himself, and died within the term; there it was questioned, whether his Executors should have this rent, or not? And it was adjudged, that they should have this rent in the right of their Testator, and this was there so agreed by all; but the difference was there taken and agreed between Fee-simple or Freehold, with such a special reservation, and a Lease for years. And the reason why the Executors shall have the rent is there given, because they do represent the person of the Testator; and they in this relied very much upon Littletons Case, in his Chapter Of Conditions, fol. 77. placito 337. that the Executors to pay the money upon a Mortgage, because they do represent the person of the Testator. But the Heir doth not so represent the person of his Father. And Wray there put the difference, and the Case upon it, that for the salvation of the estate, the Executor do represent the person of the Testator.

But it is not so to be always; for where it tends to the destruction of the Will, there it shall not be so. As if a Williein hath goods, makes his Executors, and dies, here the Executor doth not so represent the person of the Testator, as that the Lord may seize these goods, as the goods of his Williein; in this Case the Lord shall not seize the goods, because this should tend to the destruction of the Will; and therefore no representation here in this Case of the person of the Testator by the Executor, and this is proved by 3 H. 4. 30 E. 3. & 12 Affisar. A Lease made of two Acres

14 Eliz. Dyer, fol. 307.

10 E. 4. fol. 6. &c.

2 H. 7. fol. 5. 15 H. 7. fol. 14. &c.

Term Pasch. 27 Eliz. B. R. Constables Case.

Littleton's Conditions: fol. 77. placito 337.

3 H. 4. 30 E. 3. 12 Affisar.

Acres for the one, reserving a rent to him and to his Heirs, and for the other reserving rent unto himself.

As to the principal Case here in question, if it shall be so, as I have proved. That if he devise the term generally, that he shall have this for the whole term; so it shall be also, if he devise a rent out of this Lease-Land generally, this rent he shall have for the whole term; my major Proposition for the Land, my minor for a rent out of the Land.

And if it shall be so in Cases of Reservation, à fortiori, it shall be so in Cases of Grants; and if so in Grants, so it shall be in construction of Wills; and herein we are not to relinquish the rule of Law. For as before, Si à jure discedis vagus eris. As to the other Clause in the Will, That if the rent be behind, that it shall be lawful for her and her Assigns to distrain for this, her Estate is enlarged by this distress, as before I have shewed.

But in this Case, notwithstanding we do herein differ in opinion, yet there is here digitus Dei. For the Will here is not truly sound, and if so, then it is to go to the blood; by this Will the Plaintiff hath a good right to this Rent, and so Judgment ought to be given for him.

Dodderidge. If a Rent be granted to one for life, with a distress limited to him and to his Heirs. I agree that this shall now be a Fee-simple. But if he grant that J.S. and his Heirs shall distrain for this, otherwise it is. But when one doth limit an Estate in Rent to one for life, and doth also further express, that if it be behind, that it shall be lawful for him and his Assigns to distrain for this Rent, this shall not enlarge the former Estate.

And so without any further debate this Case rested; the Court being divided, two against two, for the main Point (S) the time for the continuance of this rent. And in some other Collateral Points they differed in Opinion. As appeareth before in their Arguments.

The Court  
divided two  
against two.

*Daniel Plaintiff against Waddington Defendant.*

Entred Hillar. 12 Jac. B. R.

Rot. 1163.

An Ejectione  
firmæ.

2 Cro. 377.

1 Ro. Rep. 309.

2 Ro. Rep. 89.

1 Ro. Abr. 831.

2.

**I**N an Ejectione firmæ the parties at issue, upon Non culp. pleaded, the Jury found a special Verdict, upon which the Case briefly was this, (S) three joynt-tenants for life (S) William Daniel the Father, Cicely the Wife, and William the Son; the Father dies, Cicely the Wife make a lease for 60 years to the Defendant, if she and William the Son shall so long live, William surrenders his Estate, and takes a new lease of the Lord of Hartford, and makes a lease to the Plaintiff, Cicely dies.

The Point considerable, Whether this lease so made shall be now determined, or not?

It was urged for the Defendant by More and Finch Serjeants, that this Lease should not be determined. And that three matters are considerable in this Case. (S)

2. Two joynt-tenants for life, the one of them makes a lease for years, (if he and his Companion so long shall live) the other dies during the lease. The first Point, Two joint-tenants are, one of them makes a Lease for years, and dies; whether the lease be by this determined, or not?

Points in the  
Case.

Coke Chief Justice. This was Collyers Case, where this was adjudged to be a good Lease.

Second Point, Cicely and William being joynt-tenants for life, Cicely makes a lease for years, if she and William shall live so long; omitting these words (S) (or either of them) whether this lease shall be by the death of Cicely determined, or not?

Coke



Coke. If tenant for life makes a lease for years, if he and another shall so long live; clearly this lease shall be determined by the death of one of them.

That this lease ought to continue notwithstanding the death of Cicely, the lease being made by her, if she and William her Companion so long shall live. Wherein the difference will be between a meer collateral limitation, and where the same is mixed with an interest, as appears Coke 5 pars. fol. 9. in Brudenells Case, Littletons Case, in his Chapter Of Joynt-tenants, fol. 64. placito 289. Two Joynt-tenants in fee, the one of them makes a lease for 40 years of that which to him belongeth, and afterwards dies either before the lease begins, or during the same, yet this lease shall have still continuance. Coke 5 pars.  
f. 9. in Brudenells, &c.

Plach. 37 Eliz. B. R. Rot. 244. Harbin and Bartons Case was urged.

Doderidge Justice. In Harbin and Bartons Case, the Judges here were divided in Opinion. Two against two, but afterwards it was adjudged at Serjeants Inn, that the lease for years should have continuance, notwithstanding the death of one of the Joynt-tenants. Pasch. 37 Eliz.  
B. R. Rot. 244.  
&c.

It was further urged in this Case, as touching the manner of this limitation, if the lease here should determine by the death of one of the Joynt-tenants; the words of the limitation being, if he and William should so long live, (and doth not say of any of them) Termin. Pasch. 29 Eliz. Rot. 1410. between Baldwine and Cox, where the limitation of a lease for years made by Sir Richard Wayneman to Trupenny, Habendum for 40 years, if Trupenny, his Wife, or any Issue so long should live, it was adjudged, that by the death of one of them the lease was not determined; because an interest passed to the Lessee. The limitation here is no more than the Law implies, this being as much as if it had been said, if Cicely or William so long shall live, and a fortiori it shall be so here, because this lease was made by one who had an interest. If two Joynt-tenants for years do make a lease for years, if they shall so long live, if one of them dies, yet the lease shall continue, 30 Affisar. placito 8. A Lease made to two for their lives, & diutius eorum viventi, so much is tacite implied by the Law without these words. Pasch. 29 Eliz.  
Rot. 1410. &c.  
  
30 Affisar.  
placito 8.

As to the Point of the Surrender, Two Joynt-tenants for life, the one of them makes a lease for years, with the limitation as before; the other surrenders his Estate, afterwards he which makes the lease dies; whether this lease shall have continuance, being made before the surrender. It was urged, that this lease should have continuance, being derived out of both their Estates, 20 E. 4. fol. 13. touching an interest sealed in a third person, there tenant for life grants a Rent-Charge, and afterwards surrenders, yet the rent shall have continuance. In Harbin and Bartons Case, where two Joynt-tenants for life being, the one makes a lease for years, the other surrenders; afterwards he which made the lease dies, there held the lease to have continuance. 20 E. 4. f. 13.

It was further urged, that this lease grows out of the power which the Law gives to every Joynt Estate; and this lease is derived out of this. And the surrender here is the act of the other, the which shall not destroy this lease; but it shall continue good. This lease not being derived out of the possibility of survivorship, but out of the power which the Law gives to a Joynt Estate to grant a present interest. Which cannot grow out of a possibility.

For the Plaintiff, it was urged by Hide and Davenport, that the Joynt-tenancy here is severed, and that there is no difference whether the lease was made before or after severance of the Joynt-tenancy.

It is to be examined, Quid in rei veritate doth pass here, each of them hath a moiety to pass; this lease must be agreed to be good against the Survivor, where there is a Survivor, but not otherwise.

And Brudenells Case, Coke 5 pars. fol. 9. was much insisted upon: A lease made to one for his life, and the life of J. D. if he dies, yet the lease hath continuance, because he hath this for two lives; but if a lease for years be made with sally

such a limitation, that if he and J. S. shall live so long, this is a limitation collateral, and here by the death of one, the Lease for years shall be determined.

And so it is, if a Lease for years be made to one, if the Lessor and another shall so long live; this is merely collateral in both; upon the surrender it was urged, that by this act of the other the Survivorship is determined; the Lease made by the other, by his death is determined, and shall not have continuance, for that this act, (S) the surrender doth now so far operate, as that it doth now turn the Lease made by Cicely, to be a Lease out of her moiety, and so determinable with the same, and not to have continuance after this ended, being by her death.

Coke 6 pars,  
fol. 79.

And the Lord Aburgavencies Case, Coke 6 pars, fol. 79. much insisted upon; where two Joynt-tenants in Fee, the one grants a Rent-Charge in Fee, and after doth release to the other; by this Release the right of Survivorship is quite taken away, and the Rent-Charge not avoidable by the death of him that did release; and by the acceptance of this Release, he hath deprived himself of the means to avoid this Rent-Charge, (being *jus accrescendi*) and taken away by the Release; and so this Lease here is not to have continuance after the severance of the Joynture, by the act of him which did not make the Lease.

Croke Justice. Cicely and William being here Joynt-tenants for life, Cicely makes a Lease for years (if she and William so long shall live, omitting these words, (or either of them) Whether this Lease shall be determined by the death of Cicely, or not?

The reason of the continuance of the Lease is to be examined, being, because there is a continuance of the Estate; and therefore if this Estate be determined, the charge also shall be gone.

Haughton Justice. Two Joynt-tenants for life, if one of them makes a Lease for years, if he and J. N. shall so long live; if one of them dies, the Lease is determined.

Croke. If they both joynt in this Lease, and with this limitation, if they shall so long live, this Lease shall be for both their lives.

Dodderidge Justice. If this Lease at the first shall issue out of the whole Land, and the Survivor be once chargeable with this, the severance of the Joynture afterwards shall not determine this Lease; if two Joynt-tenants be for life, one of them makes a Lease for years of the whole; if this Lessor survives, it shall be good for all.

Haughton. This Lease here is issuing out of the whole Estate, but upon a condition in Law.

Dodderidge. In Harbin and Bartons Case, there the Lease was made, which did charge the Survivor with a moiety.

Nota. That on another day this matter was moved again.

Coke Chief Justice recited the Case as before: If one doth make a Lease for years, if J. S. and J. D. shall so long live; one of them dies, the Lease by this his death shall be determined.

Here in this principal Case, two Joynt-tenants are for life, one of them makes a Lease for years, if he and his Companion shall so long live; the Joynture between them is afterwards severed, then the party who made the Lease dies, Whether this Lease shall still have continuance, or not?

As to this, an Estate surrendered may have continuance to divers purposes; here the Lease is good for both their times, and if one of them dies, it shall be good during the life of the other.

But here in this Case the Joynture is severed: As for this the Case is, Two Joynt-tenants for life, the one makes a Lease of his part for years, if he and his Companion so long shall live; the other surrenders his Interest unto the Lord in reversion, and takes from him a new Estate, Quid operatur by this?

This is a good Case, and well to be considered of.

Haughton.

Haughton. If two Coparceners are, one of them grants a Rent out of the undivided moiety: Partition is afterwards made between them, the Rent shall then issue out of this divided moiety.

Coke agreed this to be so: And so it shall also be in case of a Lease, where an Interest doth pass.

Dodderidge. The matter here resteth wholly upon the continuance of this Lease, whether the same shall in this Case still continue, or not, after the death of Cicely the Joynt-tenant who made the Lease.

Coke. As to Harbin and Bartons Case before remembred, I did very much doubt of it before the same was adjudged, but now I am well satisfied herein.

Dodderidge. This was so adjudged but by one voice.

Coke. This Case was not then argued by the Judges judicially, but only in this manner, (S.) Each of the Judges being demanded their Opinions, (S.) What say you? and so to the rest, and in this manner it was adjudged.

Afterwards, upon consideration had of this Judgment, and of the manner of it, one then said, Quod major pars vicit meliorem, the same Judgment being but by one casting Voice: Before this Judgment, I was not well satisfied herein, but now I am.

And so without any further debate at this time, the same was adjourned unto a further time.

Afterwards, (S) Termin. Hillar. 13 Jac. B. R. This Case was moved again, and argued.

Coke Chief Justice. Harbin and Bartons Case remembred was this; An Estate for life made unto two, The one of them made a Lease for years, to begin after his death, here a present Interest passed to the Lessee; if his Companion died the Lease not good, but otherwise if he himself died; here in this Case, if he surrendred who made the Lease, then the Lease not good, for that it rests upon a meer contingency, and if this be prevented, the Lease shall not then have continuance.

If two Joynt-tenants in fee be, one of them makes a Lease for years, rendering Rent, and dies, his Companion shall not have the Rent: The Lessee may distrain upon any part of the Land: And if they make partition, and the Cattel of the Lessee come upon the part of his Companion, he may there distrain them for the Rent.

Two Joynt-tenants be, the one of them makes a Lease for years, if they two so long shall live, the life of man is collateral to the Estate for years, no dowering of Estates.

Termin. Pasch. 28 & 29 Eliz. Rot. 141c. A Case between Baldwin and Cox was cited by the name of Trupenny's Case, with which I was of Council, where the limitation of a Lease for years made by Sir Richard Wainman unto Trupenny, was in this manner, (S) Habendum for forty years, if Trupenny, his Wife, or any Children of his so long should live, Pasch. 28 & 29 Eliz.

It is plain here, that the last (or) disjoyns all; the Copulative there disjoyned, by the Disjunctive subsequent: If he, and his Wife or Children, this last (or) doth disjoyn all, as in that Case it was agreed.

Dodderidge Justice. The difference will be, where it is parcel of the Estate, and where it is merely collateral.

It appears by Littleton, that in Case of Joynt-tenancy, survivorship is given by the Law of the Land, as an incident unto the Estate by Law; and you now draw this Estate for years, to have a continuance, where there is no survivorship to take place between them: This cannot so be by any means.

The



The Court then demanded to have the Lease shewed, to see whether these words were in it, (S.) (or any of them) which makes the other point.

Dodderidge. If two Joynt-tenants be for life, the one of them makes a Lease for years of his moiety (if he and his Companion so long shall live) the other surrenders up his Estate to the Lord in Reversion, who takes a new Estate of him, and makes a Lease to the Plaintiff.

The Defendant in this principal Case claims under the Lease made by Cicely, the Plaintiff under the Lease made by the Joynt-tenant who surrendered, and took a new Estate.

The whole Court clear of Opinion, that in this Case the Lease made by Cicely, by her death was determined, and should not have continuance after her death, and that the Plaintiff here hath a good title.

Judgment for  
the Plaintiff.

And so by the Rule of the Court, Judgment was given for the Plaintiff.

*Barbara Harbert Plaintiff against Bynion  
Defendant.*

A Writ of Er-  
ror to reverse  
a Fine.  
1 Ro. Rep. 323.  
1 Ro. Abr. 140.  
Cro. Ja. 392.  
111.  
Mo. 342. 847.  
848.

**I**n a Writ of Error, to reverse a Fine levied of two Houses and Land, by Richard Harbert the Husband, and by the Plaintiff in this Writ of Error unto Robert Bynion and his Heirs, at the Great Sessions held for the County of Montgomery, before Lewknor and Townshend Justices of the Great Sessions, the 24 Julij, 7 Jac. which was a fine sur releas of the Husband and Wife, and their Heirs, unto R. B. and his Heirs, dated 9 Novembis, 11 Jac. The Justices upon this certified the Record hither, the Writ of Covenant, the Return, the Dedimus potestatem, the Concord, and all Requisites: The Error assigned, because the Writ of Covenant port date after the Test of the Dedimus potestatem, and so prayed a Scire facias against Tho. B. the Son of R. B. the Conusor, who said, that by this Fine R. B. was seised of this Land in Fee, and died so seised, by and after whose death the said Land did descend unto him as Son and Heir of the said R. B. and that he being within age, was in the Custody of the King, as his ward, by reason of the tenure of the said Lands. And for his non-age, he prayed his age, and that the Parol might demur till his full age.

Barbara Harbert counterpleads this age, and saith, that long time before Rich. and Barbara had any thing in &c. Rich. H. the Father of the Conusor, and Eliz. his Wife were seised of this Land in the right of Eliz. and being so seised, they made a Feoffment unto two, to the use of R. H. the Son and Barbara, and to the Heirs of their two Bodies, leaving the Fee in the Heirs of Rich. the Father, virute cujus, &c. & vigore Statuti, of 27 H. 8. they were seised in tail, and being so seised, this Fine was levied to Robert Bynion, to the use of him and his Heirs.

And also that the same day the Husband alone of the same Land, did levy another Fine to the same Conusor, with Warranty, to the use of him and his Heirs; afterwards the said Robert Bynion died seised, and this descended to Tho. Bynion his Son and Heir, and demands Judgment; Whether as this Case is his age shall be allowed; this being by this Writ, if reversed, to be restored unto her Writ of Dower, in which age is not to be granted?

Upon this Counterplea Tho. B. demurred in Law.

This Case was long argued at the Bar, and after by all the Judges.  
These Cases were urged against the age.

9 H. 6. fol. 46. In an Attaint age lieth not, 40 Affisar. placito 16. in a decret age lieth not. 9 H. 6. f. 46. &c.

Coke Chief Justice. One Action grounded upon another, shall ensue the nature of the same Action upon which it is grounded, 35 H. 6. if summons and seberance shall be in the first Action, it shall be so also in the second.

This Writ of Error here brought, shakes the Inheritance.

If one hath two Fines, a Writ of Error is brought upon the first, Will you oust him of his age, because the second is erroneous?

Jones, cited 44 E. 3. that in Dower the Heir shall not have his age.

Coke agreed this to be so, and it is very clear.

Haughton Justice. By the Replication here, he makes a title to have Dower, and this shall be quite lost, if age shall be here allowed.

Dodderidge Justice agreed herein.

Coke. There is no authority for this, he was therefore unwise to joyn in Demurrer.

Dodderidge. This Writ here is but to restore her unto an Action, in which Action no age lieth.

Coke & Croke. What is this to all strangers which have the Inheritance, this shall be very prejudicial to them.

Haughton. Here she hath title of Dower, the which shall be lost, if age be here allowed.

Coke. If the Fine should be shaken only as to him alone, which is not so. I agree if the same had regard only to the Wife, but here in this Case if it be reversed, the Ter-Tenant shall lose his Inheritance.

Dodderidge. He hath another Fine.

Coke. Clearly the Ter-Tenant in a Writ of Error shall have his age: In a quod ei deforceat, he shall have his age; we are here in a Case in which he shall have his age, (S) in a Writ of Error.

Haughton. In an Attaint age shall not be granted, by reason of the mischief that may ensue, because the Jurors may all die, and so the same mischief may be in this Case; and it is a clear Case, that in Dower executed, age shall not be granted.

Dodderidge. We are to weigh the mischief here in this Case, both are matters of delay, he may here lose her title of Dower.

Coke. We ought here to weigh the right of the Infant.

Dodderidge. He shall not lose any of his right in this Action.

And for this time this Case was adjourned for further argument herein.

Afterwards, (S.) Termin. Hill. 13 Jac. B. R. this Case was moved again, and long argued at the Bar, and after by the Judges, and by the Judgment of the Court age was allowed. Termin. Hill. 13 Jac. B. R. &c.

It was urged, that age should here be granted, otherwise the Heir who hath possession by descent of a Freehold, should lose this his possession, if age denied him.

In 21 Eliz. between Worley and Charnock, B. R. Age allowed by the Court for this reason, because that by the Wives reversal, the whole Estate by this shall be reversed. 21 Eliz. B. R. &c.

It is no reason to proceed against an Infant in a Writ of Error, for he may have a Release to plead; and also it is uncertain, whether he will bring a Writ of Dower, or not, if he do reverse this Fine.

Obj. As to the Objection made, that the Infant by this reversal shall not lose his Inheritance, because he hath another Fine that was levied to him, and the Writ of Error here is brought upon the first Fine, and he hath a second Fine.

Resp.

Resp. In answer to this, this is no reason, for the second Fine may be also erroneous, both of them being levied on the same day, and this may tend to the loss of his Inheritance, if his age be denied him, 4 Mariae, Dyer fol. 137. in *Balfets Case*, the reason there given, why an Infant shall have his age, because he cannot discern his own right, and by 8 E. 3. fol. 10. The Court *ex officio*, ought to speak for an Infant.

It was urged by Jones, that age ought not to be granted.

In the Bar, here a Fine is shewed to be levied to his Father, and a descent to him within age. The other replies; that her Husband was seised, and that she joyned with him in the Fine, by which she was barred of her Dower, confesseth the descent, after her Husband dies, and to be restored to her Writ of Dower, this Writ brought upon the first Fine levied, 27 H. 6. fol. 1. 43 Assisar. placito 21. In a *Quare Impedit* no age to be allowed, because in the mean time laps may incur, and so in this Case, in the mean time, by this the Action of the party shall be lost; And this is the reason here given why age is not to be granted, because the party may lose her Dower. It was also urged, that this Writ here is in the nature of a Writ of Dower, because it is to restore her unto this; and this being of the same nature, she is to have the same privilege. The Writ of Attaint and Error do follow the nature of the first Action, and therefore if no age be to be allowed in the first Action, none shall be allowed in the other by 9 H. 6. fol. 47. the reason there given in the Attaint against the age, because in the mean time all the party Jurp may die, 47 Assisarum placito 4. & 47 E. 3. fol. 7. an Infant shall not have his age in a Writ of deceit, and with this agrees 35 H. 6. fol. 44. where the Case is put of a Writ of Error, and no age to be allowed.

Coke Chief Justice denied the grounds before put, for if Tenant *pur auter vie* be disseised, and brings a Writ of Entry against the Heir of the Disseisor, he shall have his age; and yet the tenant is to have but an estate for life. The point here is this; the husband and wife levies a Fine, and the Writ of Error here is brought to reverse the whole Record; whether age in this Case is to be allowed, or not?

Dodderidge. Lands are given to the Husband, and to the Heirs of the Wife, a recovery by default is had against them, the Husband dies, the Wife brings a *Quod ei deforceat* against the Heir of the Recoverer (who being within age, prays his age;) he shall not have his age in this Case.

Coke. He shall in this last Case put, have his age. Also if it be not in the Case of Dower, in a real Action, he shall have his age; and here is no Dower settled in the Wife.

Haughton. She shall have a *Quod ei deforceat*, when Dower is executed.

Object.  
Resp.

Coke. The Writ of Error doth pursue the nature of the first Action; and if summons and severance be in the first Action, by 35 H. 6. it shall be so in the second Action. It hath been objected, that here there is a second Fine. If so, yet this Objection is of no force. But here it appears unto us visibly, that the Inheritance of the Infant is to be lost; this is visible, and in bar of age you never ought to bring a title of Dower in question, which is but a possibility of Dower, and not known whether she will have any Dower, or not, there being none executed.

Dodderidge. What which staggers me in this Case is, to see what prejudice by this should grow to the Infant, if his age be disallowed; If no prejudice, why ought we not then to speed this Action? For the wife may die before the full age of the Infant, and then her Action shall be lost. If she doth reverse this Fine, what is she then to have by this, nothing at all? Age is to be allowed to an Infant, where he is to defend his right. But where he is to have no prejudice by the denying of age, there the same is not to be allowed to him in prejudice of another.

Coke. One being seised in Fee-simple, makes a Feoffment in fee to one, and to his Heirs; afterwards he levies a fine to him and his Heirs; the Conusor dies, this descends unto his heir within age; the Heir of the Conusor brings a Writ of Error against



against the Heir of the Conuſee, to reuerſe the fine, who prays allowance of his age, if the other ſaith againſt this; you ought not to have your age, becauſe you have a freſtment made by my Father to your Father and his Heirs; ſhall this plea ouſt him of his age? clearly it ſhall not; No more here in this Caſe, by ſaying he had a ſecond fine.

Haughton. This Land here is held of the King in capite, and this is ſo confeſſed by both ſides; ſo that now by this, here is a title appears for the King; and it is ſhewed, that the Heir was in cuſtodia Regis, but doth not ſhew that the Lands were ſeiſed into the Kings hands, and therefore we now ex officio, ought to ſend you into the Chancery.

Coke. If it be ſo, we then ought to look unto this.

And ſo at this time, The whole Court (Dodderidge excepted) were of Opinion, for the allowing of Age.

Coke & Dodderidge. This which is moved for the King is no matter.

Afterwards, on another day in Hillar. 13 Jac. the Judges argued this Caſe.

1. Haughton Juſtice. Rehearſed the Caſe, as beſore, the ſole point being, whether age ought here to be allowed, or not? That here he ought to have his age granted unto him, according to his prayer.

In this queſtion, which is very copious in our Books, many queſtions are determined by Statutes, and by the Common Law, as to this matter of age to be granted.

Stat. ouſting  
age, &c.

The firſt Statute for this is Weſtmiſter the firſt, cap. 47. which doth ouſt the Heir of the diſſeiſor, from having of age.

The ſecond Statute is the Statute of Gloceſter, cap. 2. which doth ouſt the Heir of his age in a Writ of Apel and Beſapel.

The third Statute of Weſtmiſter 2. cap. 44. in a cui in vita.

Upon theſe three Statutes diuers queſtions have riſen, of which I will not ſpeak.

At the Common Law ſometimes age ſhall be denied, for the nature of the Action, As in an Attaine, and for the loſing of the Action, which may ſo be by the death of the petit Jury, as in 9 H. 6. fol. 47. 47 E. 3. fol. 9. 44 Afflar. placito 4.

9 H. 6. fol. 47.  
&c.

Sometimes he ſhall be ouſted of his age, and ſometimes granted in Sebe facias. If one do recover in a Præcipe quod reddat againſt one; the Tenant dies, his Heir within age; here he ſhall not have his age, becauſe his title is bound by the recovery, as appears by 24 H. 6. fol. 3. 6 H. 6. fol. 46. Alſo ſometimes age lieth not, in reſpect of the loſs of the Infant, as by 21 H. 7. fol. 41. In a Writ of Annuity brought againſt a Parſon, who prays in aid of the Patron, who had the Patronage by deſcent, and was within age, and prayed that the parol might demur; here he was ouſted of his age, becauſe that this was an annual rent, and the wrong began in the Parſon: and the charge was to fall on the Parſon, and not on the Patron. And with this agrees 10 H. 6. fol. 10. ouſted of age, becauſe loſs to fall upon the Heir. Alſo the Law doth leſs eſteem of delay than loſs of Inheritance for ever; for delay may be remedied, but diſinheritance not; 45 E. 3. f. 5. In a Quid juris clamat againſt Tenant for life, who pleads that this was leaſed unto him without impeachment of waſt, ſhews this, and if he will confeſs, then he will account; it is there ſaid, that rather than the Infant ſhall make ſuch a confeſſion, age ſhall be granted him; and ſo it was.

21 H. 7. fol. 41.

The Law doth weigh matter of delay and of diſinheritance in a ballance. For I will not proſecute theſe Caſes, but come to the Point now in queſtion. In the which, Theſe two things are to be conſidered.

1. Firſt, The nature of this Action here being a Writ of Error, whether in this Action age ſhall be granted, or not?

Things here  
conſiderable.

2. Secondly, In reſpect of the title of Dower here, which he hath after the reuerſal

¶

reuerſal

reversal of the Fine, whether this shall be such an impediment, as that a ge here shall not be granted.

As to the first, being in the Case of a Writ of Error, in the which age is not grantable (but yet with this difference, (S) if it be brought against the Heir alone, age is not to be granted, if he be not tenant of the Land; but if he be tenant, then age is to be granted; and this is proved by 47 E. 3. fol. 8. a Writ of Error brought against tenant by the curtesie, and the Heir in reversion prays in aid of the Heir, and this granted, but ousted of his age, because he was not tenant of the Land. With this agrees 47 Assisar. placito 4. & 19 H. 6. fol. 25. adjudged, that the Heir of the tenant in a Writ of Error shall have his age, for so much as descended unto him. Here in this Case it is plain that he is tenant, and that his Inheritance might be lost, therefore the Law will protect him until his full age, so that in the interim he shall not sustain any loss.

As to the second Point, touching the title of Dower, alledged here to be.

I agree, that at the Common Law, in a Writ of Dower, age shall not be granted; and this is in favorem dotis, and so is 5 H. 5. fol. 13. In a Writ of Dower, the tenant doth vouch an Heir within age, and in Ward to the King, this shall not be delaid for the nonage, as it is there adjudged, 12 E. 4. fol. 17. accordingly, 44 E. 3. fol. 43. In a quod ei de forceat by tenant in Dower, to recover title de Dower, age prayed, and denied, this brought to reduce her to her eigne title, she shall not be delayed by the age of the tenant; and so is 16 E. 3. Fitz. title Dower, placito 56. & 6 H. 3. Fitz. title Dower, placito 181. that in Dower age not to be allowed. But as this principal Case here is, age ought to be granted. There is no express Case in the Law to make good my opinion, this being a new Case, but I am satisfied by the reason which I shall give.

Notwithstanding age be not to be granted in Dower, the reason of this being, because the Law gives such a privilege unto Dower, (in Case where the Dower it self is in question) but not so where the same is not in question. Here it is said, that at the time of this Fine levied, she was intitled to have her Dower, (S) if this Fine should be reversed; but whether this shall be so or not is doubtful, and she may have another right to the Inheritance; she may have title of Dower, and also title to the Inheritance, and it is in her election how she will have it. So that this Case here in question is very much different from the Case, where title of Dower is immediately in question. If one recovers against tenant in Dower, in a Præcipe quod reddat, and she brings a Writ of Error to be restored to this again (were this upon a title of Dower once executed) there age shall not be granted in delay of this.

But this is a Case of more question than this principal Case here is. For here it stands indifferent unto us, whether unquam or nunquam, her title of Dower shall come in question, and this reason gives me satisfaction.

Object. It hath been Objected, that by the disallowance of age, the Heir here shall not be disinherited, because that Herbert the Husband had levied a second Fine unto Bynion and his Heirs, and this to bind the Husband and his Heirs.

Resp. This is so said, But this doth not so appear to us, as Judges; but if it be so, there may be means also to avoid this Fine; there may be error also in this Fine, and this is a very forceable reason, that before Dower be executed, or directly in question, there shall be no cause for this, to oust the Heir of his age.

Another reason may be, because this is in the Kings hands; as to this I shall say no more, but as this Case here is, age ought to be granted to the Defendant, per cause del son nonage.

2. Dodderidge Justice. The point here only is, Whether age shall be granted to the Defendant, or not? In this Case I have much staggered in my opinion. I do not find this Case in all the Law, and therefore this is not to be discussed by multitude of Cases, but by Reasons. In this Case there is a sure way, but this is not

not a safe way: For to grant the age here is a sure way, and no Error shall be for this: But this (in my conscience) is not a safe way, for in this we shall do wrong.

Coke 6 pars, fol. 3, 4. Markam's Case, as touching this learning in general; but I will not insist upon general Cases, which concerns the Plaintiff or Defendants; many differences there are to be observed in them, according to the difference of Actions. Coke 6 pars, fol. 13 &c.

But to proceed now unto my Reasons, whereupon I do ground this my opinion against the granting of age in this Case.

First, If here be no detriment to come to the Heir, nor any loss; and if a loss be to no purpose, if it be so, to what purpose shall it then be for us to grant him the benefit of his age, when as by this Grant there is a manifest mischief on the other side? And we in this, and in all other Cases, ought always to prevent the greatest mischief. Reasons against the granting of age.

If the Fine here at this time be erroneous, the same will be also erroneous at the full age of the Infant: If age be here granted, this is but matter of delay for the tenderness of the Infant: The Wife here seeks her Dower for her life, she may die before the Heir comes to his full age, and then her Dower is lost, and she remains impoverished in the interim for her life; and it belongs properly unto us to see and consider which shall be the greatest mischief, and so to use our best endeavours to prevent this.

In this my Argument, I will pursue that course which was last taken, As (S.)

1. First, I will speak unto the Writ of Error, and whether age shall be granted in this, or not?

2. Secondly, If the title of Dower be considered in this Case, whether then age shall be granted, or not?

1. In a Writ of Error, in some Cases age shall be granted, and in some Cases not: And this doth not rest only upon the difference before put, where he is Tenant, and where not.

In 9 H. 6. fol. 18. & 19 H. 6. fol. 25. in Dudleys Case this Rule is cross.

47 E. 3. fol. 7, 8, 9, 10. Sir Richard Woldgraves Case, a notable Case (and the best Case argued in all the Quadregel.) there the difference is put, where it is an error in Law, and an error in Fact, and many differences are there put, where the Heir may plead in discharge of the Error, and where not. 9 H. 6. f. 18. &c.  
47 E. 3. f. 7. &c.

And 47 Affar. placito 4. the same Case, Error sur un scire facias, upon a Fine levied of a Panoz, with a fore-prise. 1. Tenant in tail died without Issue, he in remainder in tail, port un scire facias, to execute this without the fore-prise, he had Judgment to recover the Heir in by descent; a Writ of Error brought upon this against the Heir, age there prayed; and whether the Heir shall have his age to him allowed, is there very well debated, and that by notable Reasons drawn out of the very foundations of Reason; and there a good difference is put, where he is Tenant, and where not, and prays his age.

And the reason there given why he shall have his age, where he is Tenant, is because the Law supposes him to be of such an age, as that he cannot be Consultant of his right, that he cannot make a good defence of his right, and so for this cause it should be very prejudicial to him, if his age there should not be granted to him, (and this is upon the difference there, where it is an error in Fact, and where an error in Law) where it is an error in Fact, as before, and upon the former reason he shall have his age: But for him to know how to defend his right, against an error in Law, this is not in his Consuance to do, but this belongs to the Judges to do for him, and they are to see to this on his behalf, that nothing be done in this, but that which is right.



Obj. But it hath been here further objected, That he may plead in Bar to the Error, with more ability when he comes to his full age.

Resp. But in this Case, what he can plead here, we do see it all by the pleading it self.

Obj. It hath been further objected, That he may plead a release of all Errors in far better manner at his full age, than before, (the release of which, of the Defendant, is not in this Case) for the Husband died after the death of the Father of the Infant, and then he was a feme Covert.

Resp. But if he pleads a release of Errors, what ought the Judges then to do? Shall we affirm the erroneous Fine? this we are not to do, neither the good to the one, nor the ill to the other.

2. It is now to be examined here, what the Heir shall lose if this Error assigned shall be presently examined, and the Fine upon this reversed; by this he shall not lose his Land, the Plaintiff by this her Writ demands nothing.

Obj. But it hath been objected, That by this he hath lost one of the Strings of his Bow, (S) this assurance by Fine, which is reversed.

Resp. If he do lose this, it is but a broken Staff, and this would not have pleased him at his full age, and so by this he hath lost but a broken Staff.

If this Fine be not erroneous, he shall then have no harm by the proceedings in this.

This Case is a new Case, and very much differing from all the other Cases before put.

Where delay is on the one side, and a particular mischief on the other side, we who are Judges, ought rather to regard the mischief, than to suffer and give allowance to matter of delay, which in such a Case ought not to be suffered.

No mischief is here unto him, if the Fine be reversed, for he hath another Fine of the same Land.

Obj. But as to this, there is an Objection also made, (S.) That this Fine also may be erroneous.

Resp. As to this, the same is only conjectural, and we do not see this to be so, neither ought we to imagine it to be so.

If this Fine be erroneous, the same will not benefit him now, nor yet at his full age.

If the same be not erroneous, it will no ways hurt him to have this to be presently examined: And as this Case is, he cannot plead any thing against this, for this Case runs between all the other Cases.

47 E. 3. f. 7.  
2c.

In a Writ of Error, where age shall be granted, and where not, appears by 47 E. 3. fol. 7, 8. 9 H. 6. fol. 18. 19 H. 6. fol. 24. 30 H. 6. fol. 2. b. age lieth not in Error, by Fortescue, as the Case may be, 9 H. 6. A Writ of Error brought the Heir in Ward to the King, and the Lands seised into the Kings hands (as it is not here in our case) and therefore age was there granted to the Heir: this Case is argued in 9, 18, and in 19 H. 6.

Now to exemplifie this, with the reasons of other Cases.

So is an Attaint to reverse a faux Verdict, in manner as a Writ of Error: These two have a restoring property in them.

All our Books agree, that in an Attaint, an Infant shall not have the benefit of his age: (but this is questionable in a Writ of Error) And the reason of this is, to prevent a mischief which shall be great: if all the Petit Jury should die, for then by this he hath lost his Action.

And this mischief is here in our Case, for if the Wife who is Plaintiff here should die, in the interim, she hath lost her Writ of Dower.

In an Attaint it shall be so as before, and for the same reason before remembered.

By 40 Assisar. placito 27. 9 H. 6. fol. 47. & 47 E. 3. fol. 8. there is a resolution of all the Judges, that he shall be ousted of his age: In a Writ of Desceit, Whether he shall have his age, or not?

40 Assisar.  
plac. 27. &c.

All these three Writs, (S) Error, Attaint, and Desceit, are to restore the party to that which he hath lost.

Writs of re-  
turning.

1. By erroneous Judgment, upon reversal to be restored.

2. For a faux Verdict upon the Attaint.

3. Upon the Desceit.

All these three are of one and the same nature.

Desceit in non-summoning of the party, Tenant as he ought to do: And these Cases are as like unto our Case as any can be.

In a Scire facias against the Heir, upon a Recovery by the Ancestors of, &c. by an erroneous Judgment; the Heir being in under this, a Scire facias brought to execute this against the Heir, upon a Judgment given against his Father, he shall not here have his age, by 18 E. 3. fol. 34. 22 E. 3. fol. 22. 27 E. 3. fol. 88. 47 E. 3. fol. 13.

18 E. 3. f. 34.  
&c.

It may be here demanded, for what cause, for he is in by descent, and may lose his Inheritance; the same Objection there made, as here in our Case: He may have a Release to plead, but he shall not have this here; there it is said, we ought to give credit to a Judgment given; this Bar here pleaded was a Judgment, and therefore for non-age he ought not to be delayed of his execution; there it is said he may plead by his Guardian, and Judgments given ought to be credited, being given against the Ancestors, and the Heir in under this, and Execution ought not to be delayed.

So here in this principal Case, you are in under an erroneous Fine, you may plead your Plea to this by your Guardian.

2. The second matter here considerable is, Whether in regard of the title of Dower which appears, and this Writ being to restore her to her Writ of Dower: Whether in this Case age shall be granted, or not: age is not here to be allowed.

In a Writ of Dower, age ought not to be granted, as appears by many Cases, as 17 E. 3. f. 59. 44 E. 3. f. 43. 5 H. 5. f. 13. 12 E. 4. f. 17. and many other to prove this.

17 E. 3. f. 59.  
&c.

Two Reasons are given for this in the Old Books, and admitted of in the later Books.

1. Reason, Because that Dower is very much favoured in the Law.

Obj. As to this it may be here said, That she hath no Dower.

Resp. In answer herunto, she shall be favoured in the bringing of this Writ, for if the Law do so much favour the Estate of Dower, it doth also favour the means of coming unto this, and this of necessity; and so for this cause no age is to be allowed in this Writ.

2. A second Reason, because this is a speedy suit, and therefore no delay to be admitted of in this.

Also no mischief by this shall come unto the Heir, for she shall recover but a particular Estate for her life; and to be attendant upon the Heir, she is to be in of the Estate of her Husband: And if she shall have this favour by the Law, when her Dower is settled she shall have this favour also in the means to come unto it.

44 E. 3. fol. 43. A Feme hath an Estate in Dower, she takes a second Husband, they are impleaded, she brings a Quod ei deforceat against the Heir, who proved to have his age, there ruled, that he should not have his age in Dower, and therefore not in this Action, being only to restore her to her Dower.

43 Assisar. placito 22. the Heir in ward, the Spanoz of Dale descends unto him, where it is said, if he be ousted of his age in one Action, he shall be also ousted in another

43 Assisar.  
placito 22.

another Action, being of the same nature there ruled, that age shall not be allowed, being in the nature of a Quare Impedit, for the avoiding of delays by laps: And this may be another reason for it, because that by this the Inheritance of the true Patron may be lost.

In 44 E. 3. it is there adjudged, that if Dower be settled, he shall not have his age: The same reason shall be in an Action, which is only to bring him to this Action.

So here in this Writ of Error, the same is to be as much favoured in Law, as the Writ of Dower it self, this being the only means to enable her to have a Writ of Dower, and so by this to come to the Estate of Dower: For one shall never come to an Estate, if the Law will not favour him in the means.

Obj. It hath been objected, That it is uncertain whether she will bring her Writ of Dower, or not?

Resp. As to this, let us do right, and let her do then as she will, the election being in her self: let us give unto her wings, her liberty in denying of the age, the which if we shall not do, we take away this her election from her: Also this is no harm to the Heir, to have a present proceeding herein, and so this Objection is of no force.

Obj. Another Objection hath been made, (S) That this Land may be her Inheritance, and she may afterwards have and make divers other Titles to this Land, and to prevent which age is to be allowed.

Resp. As to this, it appears to be otherwise, in and by the pleading here expressly, that it was not her Land; this is but an imagination, and that beyond imagination, for we do see the contrary.

This is a new Case, and therefore the same is to be argued upon new Reasons, and the best Reasons are to be gathered and collected out of the old Books; and of these more especially out of the Quadreges. of E. 3. and so upon the whole matter, the Defendant in this Case ought not to have his age allowed unto him.

3. Croke Justice. In this Case my desire carries me one way, but my Judgment leads me another way.

First, my desire is succurrere viduæ: But then my judgment saith to me, that we ought not to take away such benefit from the Infant, which the Law hath given unto him, and that is, to have his age to him allowed; and of this he ought not here to be ousted.

These three things are very much favoured in the Law, (S.)

Dos, vita & libertas, of which I will not speak.

For yet of this to shew how much the Law doth hate delays.

\* In Cases of necessity, & pro bono publico, no age is to be granted.

As in Case of a Presentment, where laps may incur before his full age: And so where an Infant doth a thing in autre droit, as if he be an Officer, or an Executor: In such Cases the benefit of his age, being but for delay, shall not be allowed to him.

And so where an Infant doth a thing of his own wrong, being questioned for this, he shall not here have his age.

But as to the present Case now in question, whether age shall be here allowed, or not? In this Case he ought to have his age, and the authorities of our Books will uphold this: And if this be a safe way (as so it is) it is also a true way, otherwise it cannot be a safe way.

9 H. 6. 47 E. 3. 12 E. 4. Whether one shall have his age in a Writ of Error, or not? See for this 9 H. 6. 47 E. 3. 12 E. 4. before remembred: In a Writ of Error, he shall not have the benefit of his age where he is not Ter-Tenant; otherwise where he is Ter-Tenant: And so here, I will thus frame my Argument: Here he is Ter-Tenant, Ideo ex consequenti, he is to have his age.

But



Object. But here it hath ben Objected, that this Fine is erroneous; and if so, it is either for matter in Fact or in Law, and that no prejudice by this can come to the Infant.

Resp. That which hath ben said in this, doth not satisfie me; the imbecillity of the Infants is such, as that he hath not knowledge to take the best way for himself, this is unus error, but it cannot be unicus error. Here I see a particular mischief, one way, to the Wife; but another way, a general inconvenience to the Infant; and the Law, as Littleton obserbeth, will rather suffer a particular mischief, than to open a gap to a general inconvenience.

All the Cases before remembred, of Attaint, Disceit, and Scire facias, come not to the reason of this Case, (pro bono publico, ne maleficia remaneat impunitum; this another Reason, why Age shall not be granted to an Attaint. Also it is not here shewed, this Writ of Error to be brought to restore the Wife, quoad breve de dotis, but also to all; and by the reversal of this Fine, this lays him open unto any demand that shall be against him, non quoad this only, sed quoad omnes & ad omnes intentiones propositas: this will lay him open unto all.

In this Case, I dare not here to decline, à via trita, quæ est via tutissima, the reversal of this Fine will lay him open unto all manner of Impeachments. And so for these reasons, as this Case is, age ought to be allowed unto the Defendant, being an Infant.

4. Coke Chief Justice. The pleading here is very barbarous, being that Baron and Feme were seised as in right of the Wife, and made a Feoffment by parol to Two, to the use, &c. this is absurd pleading; for this is not good as to the Wife. Also the plading is (John for Richard,) Also virtute cuius finis, whereas it was a Feoffment. Also when the Fine is pleaded, it is virtute cuius & vigore Statuti for the Fine, where it was by the Common Law.

In this principal Case, age ought to be allowed.

In the Argument of this Case, I will divide my Argument into three parts. (S.)

1. First, To examine the reason, wherefore age is to be granted.
2. Secondly, To consider this present Case in respect of the nature of the Action, being a Writ of Error.
3. Thirdly, To consider this Case in respect of the title of Dower here; to come unto which, this Writ of Error is the mean, in respect of the nature of the title.

For six Reasons generally, I hold that the Infant in this Case ought not to be ousted of his age.

Six Reasons  
for the age.

1. First, In respect of the end of granting age by the Common Law. (The Civil Law is against this) for by them the Guardian may bind or loose, and therefore at the Civil Law he is bound to answer presently.

But by the Common Law he is to have the benefit of his age, Quia durante minori ætate, respondere non potest nec debet.

2. He cannot be party to any averment during his minority, the Law will not suffer him to take any Issue, he cannot during this time put his title upon an Issue.

3 E. 3. placito 49. new print. In a cui in vita, age granted upon this reason.

3 E. 3. placito  
49.

15 E. 3. Age there granted, because that an Infant cannot have Conscience of his title, nor yet of the title of his Adversary, (Speculum artis est vitrum, as the Opticks hold) I say, that Speculum corporis est oculus, & speculum anime est scientia, but an Infant wants this, & ideo respondere non potest; Bracton, Britton, & Fleta, are expressly so in this, (S) Minor non tenetur respondere, durante minori ætate,

15 E. 3.

estate, because that he is altogether misconfant what thing to plead. (But there they also except the Case of Dower.)

3. A third reason drawn from the Counter-plea, of the nature of it, contra placitum, To bar one of this, which the Law gives unto him, this Counter-plea ought to be very plain and certain, as appears by our Books. The same ought to be certain to every intent. And in this, the same is like unto Estoppels, 3 E. 3. 49. the same ought to be full, 4 E. 3. fol. 40. by Wilby, a Counter-plea of age ought to be plain, the reason there given, because this doth bar one of the privileges which the Law gives unto him, 27 H. 6. fol. 11. an Infant says his age, answer there made unto him, you have an elder Brother living; and for this see 4 E. 3. fol. 40.

3 E. 3. 49.  
4 E. 3. fol. 40.  
27 H. 6. fol. 11.  
&c.

And as touching these Counter-pleas, see 25 E. 3. fol. 43. 41 E. 3. fol. 28. 7 E. 3. fol. 27. Roberts Case, 43 E. 3. fol. 18. there a Counter-plea by Argument not good, and so is 40 E. 3. fol. 14.

But here in this principal Case there is none of these, for here is a present possession in the Infant; and you would oust him of his age here, in respect only of a future possibility to have a *Writ of Dower*.

A Lease for life made, the remainder to the right Heirs of two in fee; the one of them dies without Issue before the Fine executed, the other sole shall sue execution of the whole by the survivorship; and this by the better opinion of 24 E. 3. fol. 29. Fitz. Joynder in Action, placito 10. 30 Assisar. placito 47. 18 E. 3. fol. 59.

24 E. 3. fol. 29.  
Fitz. &c.

4. A Fourth Reason, Rich. and Barbary here have released with warranty, and by this *Writ of Error* the Fine shall not be reverted, quoad the Dower only, but also quoad the warranty, and quoad the release of the Fee-simple here.

5. A fifth Reason. The Counterplea here wants trial, and this ought to be issuable: by 43 E. 3. fol. 18. Not upon possibilities, to put possessions in issue. A right of Action is not sufficient for this. No issue can be of this; for an issue shall never be made only upon a right, this is not here issuable, here it is averred, that he had title of Dower, if the other should say, he had no title of Dower, this is not issuable; and so this is a plain Rule, That a Counterplea ought to be issuable. But a right is not so. Also here, he hath neither right nor yet title of Dower, he hath neither *ius in re*, nec *ad rem*, as long as this Fine stands in its full force, and during this time he hath only a possibility of Action.

43 E. 3. fol. 18.

And this may be another Reason. If you cannot put a right in issue, à fortiori, you cannot put a bare possibility in issue, and a Counterplea ought to be issuable. And so for this reason drawn out of the nature of the Counterplea of the age, here age ought in this Case to be allowed.

6. A sixth Reason, for the allowance of age here; It appears by all the Books of Law, that these three things are very much favoured in Law. (S.)

1. Dower; (if it be in esse.)

2. Infancy; and

3. Fines; for that finis finem litibus imponit.

An Infant, respondere non potest, non debet, notwithstanding it be against Dower. When Infancy, and a Fine on the back of it comes in question, this shall not be tried nor determined during the minority of the Infant. Here you have given but a slippery title to the Infant, for the Inheritance is left in *Eliz*.

Pasch. 32 E. 3.  
in the Manuscript.

Pasch. 32 E. 3. In a per quæ servitia, an Infant shall have his age allowed him, (this in the Manuscript of the said Book not printed) but afterwards he shall have all his arrearsages from the time of the Action brought; if you cannot bar him of Attornment (as the Book is) the Law will not put him to any prejudice, and this is a good Case.

2. As touching the second part, in respect of the nature of the Action here, being a *Writ*

**Writ of Error**, the Father ought to die in possession, seise & morast seise. Not to traverſe the Feoffment, but if he be in by deſcent, 2 H. 5. f. 13. the Law is careful 2 H. 5. fol. 15. to protect an Infant, and his right, 47 E. 3. fol. 8. a good Caſe, 8 E. 4. fol. 19. b. by &c.  
Coke, In a Fault Judgment againſt an Infant, he ſhall have his age, quia reſpondere non poſſet. It ought here in this Caſe to have been ſhewed, that the Father was ſeiſed, and died ſeiſed, and that he was in by deſcent, and ſo to traverſe the deſcent.

**Object**: As to the Caſes Obſected, Of Attaint; that in this Caſe an Infant ſhall not have his age allowed him. As touching this, it is true, he ſhall not here have his age, but this is upon another reaſon.

**Reſp**. No age to be here allowed, becauſe this is to puniſh a Perjury, for this is not brought againſt one as Heir. And therefore Non-tenure is a good plea in an Attaint, and this lieth againſt one, being no party to the Record; and this ſo appears by all our Books.

In 5 H. 7. fol. 22. b. where the difference is put between an Attaint and a Writ of Error, as to the having a Superſedeas granted, the ſame not to be in an Attaint; otherwiſe in a Writ of Error, the reaſon of the difference is there given. 5 H. 7. fo. 22. b.

The Caſe of the Writ of Deſcent is not like unto our Caſe here.

In a Quare Impedit age ſhall not be allowed, for there a wrong is done, and it is a perſonal Action; and therefore—

But no wrong is here done in our Caſe, there the Adowſon is to be recovered, not ex directo, ſed ex obliquo.

3. Now as touching the third part, in reſpect of the title of Dower.

**Object**. The title of Dower, it hath been Obſected here, which the Wife, the Plaintiff here hath, and that ſhe cannot take knowledge of the Feoffment to Williams, and to uſes, &c.

**Reſp**. Notwithſtanding this, yet here he is to have his age; this being but a poſſibility, and the ſame not to be put in iſſue, as beſore.

The firſt Caſe that I was of Counſel in of the like nature, was Paſch. 35 Eliz. Paſch. 35 Eliz. &c.  
and this Caſe I then argued, where Williams brought a Writ of Dower againſt Drew, Williams the Son had recovered a Writ of Error, brought upon his Judgment; all the Tenants made default, one of them was an Infant. If an Infant makes default, ſhe ſhall recover Dower. But here, becauſe damages entire were given, if to be reverſed, it ſhall be as againſt him alone.

Trinity 4 Eliz. between Harvey and Wood, in a Writ of Dower brought in the C. B. the Tenant makes default, and Judgment upon this given againſt him, & C. B. &c.  
Writ of Error brought, Judgment againſt him, his default ſhall not aid him, being within age.

But for this, Hillar. 17 E. 2. Fitz. title ſaver default placito 80. eſt inſtar omnium, Hillar. 17 E. 2. his default in Dower ſhall not aid him being an Infant; the reaſon there given, Fitz. &c.  
becauſe in Dower he cannot have his age, and therefore he cannot for this cauſe ſave his default.

Fleta, lib. 6. cap. 42. Non reſpondebit minor, niſi in caſu dotis, & hoc propter favorem dotis. And with this agrees Braſton, fol. 252. propter favorem dotis, and for the danger, that if age ſhould be allowed, ſhe might loſe her Dower by this; and ſo here. Fleta, lib. 6. c. 42. Braſton, f. 252.

Britton, fol. 217. cap. 101. and the Regiſter, fol. 249. ſhe ought to have Dower, Britton, f. 217. againſt an Infant; and if he aſſign more to her than ſhe ought to have, he ſhall cap. 101. 27. have a Writ of Admeaſurement of Dower. Regiſt. f. 249.

Now to examine the reaſon of that, and of this Caſe.

In a Writ of Dower, ſhe is to recover an Eſtate only for her life. This is no diſinheriton; the Law gives this unto her, and ſhe hath nothing to debar her ſelf of it.



But here in this principal Case she will disinherit the Heir: here is beneficium viscatum, the other is beneficium simplex: Here she hath released her Dower by the Fine and Warranty: And this is the first reason. Another reason, the reason of Dower proves this clearly, that in this Case now age is here to be allowed: Here she now goes about, and that against her own act, to intitle her self to Dower.

Another Fine was also levied unto this, respondere non potest.

Obj. The Cases of Scire facias have been objected of 24 E. 3. and 11 H. 4. that age shall not be allowed him, because his title was disaffirmed; he said, his Father was seised, and died seised, the other shewed a Judgment had against his Father.

Resp. This is a plain Counterplea of the age, by 24 E. 3. where it is in affirmation of the title by Fine levied, and divers descents; there in a Scire facias he shall have his age, where he hath his possession by descent.

But we are here now in Case of a Fine, and therefore age to be allowed; and the reason of the Dower makes against this, for here by this she would not only gain to her self a title of Dower, but would reverse the Fine for all, even as to the release with warranty. And so upon the whole matter I conclude, and in this my Confidence goeth with verity and safety; for it is not safety, unless it be with verity, that age in this Case ought to be allowed to the Defendant, being an Infant.

And so according to these Resolutions, Judgment was entered, that age should in this Case be allowed to the Defendant, and that the Plea should stay until the full age of the Defendant.

Age allowed  
per Curiam.

### Hodd Plaintiff against the High Commission Court.

Habeas Corpus.  
1 Ro. Rep. 245.  
Mo. 840.  
2 Bulst. 300.  
Ante 109.

Samuel Hodd being committed by the High Commission Court, was brought to the Bar by a Habeas Corpus: It appeared by the return, being read, that he was committed for words, (S) That he had used divers contemptuous and reproachful words, touching their proceedings, the which they had drawn into Articles against him, unto which he did refuse to answer, and therefore they did commit him to Prison.

Barker Serjeant moved the Court for his discharge, upon the insufficiency of the return, it not appearing thereby what the words were which he spake.

Hales Case.

Coke Chief Justice. Hales Case, who was called Club-footed Hales, of which Case I have the Record: He said, That the sentence of Divorce, by them given, was against the Law.

It was in this Case questioned, Whether they themselves might punish this there or not: and held, that they could not, but that he was punishable for this at the Common Law, for slandering of their proceedings.

Here in this principal Case, it doth not appear by the return, what the words were which he spake, and they may be such as ought to be determined by the Common Law; and for this cause the return is not good, and therefore by the Rule of the Court the party was discharged.

Cockeril

## Cockeril Plaintiff against Apthorp Defendant.

Entred Trin. 13 Jac. B. R.

Rot. 1624.

**I**n an Action of Debt upon the Statute of 5 Eliz. cap. 9. for Perjury, upon Nil debet pleaded, a Verdict was given for the Plaintiff.

Richardson Serjeant moved the Court for the Defendant in arrest of Judgment, That the Venire facias was not well awarded, the same issuing without any Warrant; the Sheriff having returned the Jury without any Warrant, and so no good trial: Also the Declaration here is not good, wherein he hath not observed nor pursued the words of the Statute, the same being, That if any one, either by the subornation of, &c. or by their own act, consent, or agreement, wilfully and corruptly commit any manner of Perjury; this he hath omitted in his Declaration.

And so upon the Statute of 8 H. 6. he ought to observe the words, and to lay the expulsion to be vi & armis, and also manu forti, or not good: The Oath here laid to be, That the Defendant being brought as a witness, did swear, that the Plaintiff, succidit & effodit, a Pear-tree, (ubi revera) there was no Pear-tree there growing the precise day of the trespass; (whereas he should have said, ubi revera, Non succidit) in this the Perjury laid.

Coke Chief Justice. Ubi revera, at the time of the Trespass there was no such Pear-tree there: These Exceptions are but chips: It is very fit and necessary, when one will perjure himself, that he should endure the punishment of the Law.

Here Apthorp, as it is laid, being testis productus at the Assizes of &c. before the Judges there, falso voluntarie & corruptive juravit, quod predictus Cockeril succidit; &c. in the manner and form as the Plaintiff had declared; this is the same day, ubi revera, &c. & ulterius predictus Apthorpe, coram Justiciariis predictis, ad Assisas, dictis juratoribus, juravit, quod marenum, valebat 40 s. ubi non valebat, above 13 s.

The Declaration here is good, and the Verdict well given, and he ought to be the party grieved, or he cannot have an Action upon this Statute, but ought to have him punished for this in the Star-Chamber.

The whole Court agreed herein, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Debt on the Stat. of 5 Eliz. cap. 9. for Perjury.

Judgment given for the Plaintiff.

## Prinfton and others Plaintiffs against the Court of ADMIRALTY.

**I**n a Prohibition, prayed by Coventry, to stay proceedings in the Court of Admiralty, and upon cause shewed, the Case appeared to be this, That divers Merchants set out Ships to Sea, and they in their coming home did commit Piracy; and the Ships being here upon the River of Thames, the Admiral did seize them, to have the Goods as to him forfeited, having in his Patent these words, (S.) bona Piratarum; this he did; the Ship being upon the River of the Thames,

A Prohibition to the Admiralty.

1 Ro. Rep. 147.  
1 Ro. Abr. 532.

and so infra corpus comitatus: The Owner of the Ship did offer to put in good and sufficient Surety to answer for these goods, if it passed against him; this being refused, and he being in fear lest he should lose his Tackling, took them from the Ship, and for this contempt he was there fined at forty Marks.

Coke Chief Justice. When I was Attorney-General, I had occasion to search into the Patent of the Lord Admiral; and true it is, that in his Patent he hath bona Piratarum granted unto him: But it was then in question, what Goods he should have by these words, Whether he should have all the Goods which the Pyrate had stolen and taken away from others, or not?

And the Opinion of all the Judges then was, that he should not have these goods which the Pyrate had stolen from others, but only his own proper goods; and that the Owners of the rest should have their Goods to them restored again, if they came for them; and if they came not, then they were to be forfeited to the King, the Rule being, Quod non capit Christus, capit fiscus: Also that the Pyrate ought to be attainted of Pyracy, before the forfeiture of his own proper Goods to the Admiral.

And so it shall be, if one by the Grant of the King is to have bona felonum, by these words, he is not to have those Goods which the Felon hath stolen, but only his proper Goods: But here the Admiral ought not to sue for these Goods which he ought to have in his own Court, but at the Common Law.

A Prohibition  
granted per  
Curiam.

The whole Court agreed herein, and so by the Rule of the Court, a Prohibition was granted.

### Moormood Plaintiff against Dickens Defendant.

Entred Termin. Mich. 12 Jac. B. R.

Rot. 474.

**I**n an Action of Debt, upon an Obligation of 20 l. conditioned, that if the Obligor shall deliver to the Oblige before such a day a Powder of Lead, that then, &c. for non delivery of this, the Action brought.

The Defendant pleads in Bar, that after the entrying into the Bond, and before the day, for delivery of the said Powder of Lead, at the request of the Plaintiff himself, he had paid unto one Sheldon 10 l. for another Powder of Lead, for which the Plaintiff was indebted unto him; and this he had paid for the Plaintiff, in full discharge of the first Bond, and that so the Plaintiff had accepted of it; upon this Plea the Plaintiff demurred in Law.

The only question was, Whether by this Plea this Obligation may be discharged?

It was urged for the Plaintiff, that it cannot be thus discharged; upon the difference, where the condition is for payment of money, there he may accept of any other thing in satisfaction and performance of the condition, but otherwise it is, where the same is for doing of a collateral thing, as in this Case.

Debt upon a  
Bond.  
Perkins, l. 146,  
&c.

And this difference is so agreed in Perkins, fol. 146. placito 753. 12 H. 4. fol. 23. 4 H. 8. Dyer, Coke 9 pars, fol. 79. Peitoes Case, and 32 H. 6. 9. & 31. there the condition of the Obligation was to make a Feoffment of the Manor of Dale, he there pleads the doing of another thing in performance of the Feoffment; this there adjudged to be no good Plea. The reason of the difference: Where the condition is for payment of money, there this is a duty presently, but not payable till the time; otherwise it is, where the condition is for the performance of a collateral thing.

Coke



Coke Chief Justice. There is no great doubt to be made of this Case. It is but a by Opinion which hath been cited, that when the condition is not for money, but to do a collateral thing; this cannot be satisfied by the payment of money: and I shall answer you in this Case as Thorpe did, (S.) we will not change the Judgment of our forefathers.

Dodderidge Justice Where the condition of a Bond is to pay, or to do a collateral thing; this cannot be discharged by the performance of another collateral thing.

The first difference, where the condition of a Bond is for payment of money, this may be performed by the payment of another thing, because it is of value certain, and therefore this may be performed by any other collateral thing; otherwise it is, where the condition of a Bond is to do a collateral thing.

1. Difference.

A second difference, Where one is bound to deliver a collateral thing, they pay money for this; this is no good satisfaction, notwithstanding that Nummus est mensura rerum commutandarum, as if a man is bound to deliver to the Obligor so much Lead, of the value of 7 l. certain, and he delivers to him 7 l. this is no satisfaction of the condition, because that Lead may be worth more, the price of this may rise, it may be dearer, or it may be cheaper.

2. Difference.

A third difference, A man is bound to pay a sum of money, or a powder of Lead. If he delivers this to another, by and with the consent of the Obligor, this is a good performance of the condition.

3. Difference.

These are the differences warrantable by our Books.

Croke Justice agreed with him herein, for time may make a Commodity to rise or fall, but money is certain. We ought not to change that which hath been our opinion.

Haughton Justice agreed herein, but if one sells by Contract to another, so many fadders of Lead, if he pays money for this, this is a clear discharge of the contract.

Coke. Money is the measure of all things, much money makes all things dear, 33 E. 1. Fitz. title Annuity, placito 30. Annuity brought against the Heir, upon the deed of his Father, granted until he should be advanced by the Grantor, or his Heirs, unto a Covenable Benefice; the Defendant saith, that after the death of his Father, his Mother did give unto the Plaintiff, at his procurement, and to discharge him, the Deanery of T. and of which the Plaintiff is now seized; there Objected, that the Writing was, till he was advanced by the Grantor, or his Heirs, which is not so here, but there this answer given, (S.) qui per alium facit, per seipsum facere videtur; and therefore award was, that he should answer over: but I do doubt of this Book, this being meer collateral, 36 H. 6. ad. A man is bound to pay money at Coventry, a stranger unknown to him pays this money for him, he agrees unto it, by this he shall be discharged.

33 E. 1. Fitz.  
title Annuity.  
placito 30.

Dodderidge. Where the condition is to do a collateral thing, there in the performance of this you ought as it were to hit the Bird in the eye, and to perform this truly.

Coke. If one be bound in a Bond of 40 l. to pay 20 l. if the Obligor command him to pay this to J. S. he ought to plead that he paid this to the Obligor, by the hands of J. S. but is not to plead, that he paid the same to J. S. by the command of the Obligor.

The Court was all clear of Opinion, That the Plea of the Defendant was not good; that the Plaintiff had good cause of demurrer. And so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff.

Apthorpe

*Apthorpe Plaintiff against Cockerell  
Defendant.*

Action upon  
the Case for  
words.  
1 Ro. Rep. 287.  
1 Ro. Abr. 40.

**I**N an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff. It was moved for the Defendant in Arrest of Judgment, that the words were not actionable, being these: Old Apthorpe is a perjur'd knave, for he did swear that such Wood was worth 40 s. whereas it was dear of a Mark.

Coke Chief Justice. The words are not actionable as they are laid here, for it is laid in the Declaration, that he said, That he was forsworn at the Assizes; the words only are, that he said, He was an old and false forsworn knave, and I Cockerell will prove it.

Haughton Justice. Your meaning here is to make your Declaration go to Perjury, you ought to have said, whereas it was not worth a Mark: you say here, whereas it was dear of a Mark, this cannot be good, for he may pay 40 s. for it, and yet it may be dear of a Mark; for the maintenance of the Action, the words should have been laid to make this Perjury.

Coke. An Innuendo shall never give cause of Action, this which is here alledged in the Declaration, is but argumentative by way of Argument, and so not actionable. The Court all agreed herein against the Plaintiff, and therefore the Rule of the Court was, quod querens Nil capiat per billam.

Judgment  
quod querens  
Nil capiat per  
billam.

*Wood and Mary his Wife Plaintiffs against Doctor Suckliffe  
Defendant.*

A Trover and  
Conversion.  
2 Cro. 439.  
1 Ro. Rep. 204.  
293.  
1 Ro. Abr. 5.  
215, 771.  
2 Ro. Abr. 621.

**I**N a Writ of Error, to reverse a Judgment given in an Inferior Court at Norwich, In an Action upon the Case for a Trover and Conversion of certain goods; the goods laid to be in the hands and possession of Mary the Wife, in Parochia Sancti Petri, in Warda de Mancroft; a request laid to be made, and that the Husband and Wife refused to deliver them, and afterwards Mary the Wife did convert them to her use; upon Non culp. pleaded, a Verdict and Judgment was given for Suckliffe the Plaintiff; upon this Judgment, a Writ of Error brought.

Coke Chief Justice. First observed in this Case, that a Catell shall be charged for the escape of a feme Covert, when her Body is in execution.

It was urged, that this Judgment should be erroneous.

First, In this, the Venire facias is erroneous (this being De Parochia Sancti Petri, omitting in Warda de Mancroft) for the Parish might extend it self into divers Wards.

Also the Verdict was not good, there being divers several sums specified in the Declaration, (S) 40 l. in money, 800 shillings, and other sums, the Verdict was for 30 l. of the 40 l. pecunijs numeratis, and doth not mention what sum this was. Also the Judgment is erroneous, being that the Wife alone shall be in misericordia, where the same ought to have been, That the Husband and Wife should be in misericordia; for the conversion of the Wife, the Husband shall be amerced, and so is the Book of Entries; the first President in trespass, Judgment against Baron and Feme, for a trespass done by the Wife; and so there in title Executors, a feme Executoz, Judgment shall be against them both, and 42 Eliz. B. R. inter Percy & Bardolf. It was resolved upon the same reason, that both of them are to be in misericordia.

Old Books of  
Entries, &c.

42 Eliz. B. R.  
&c.

Coke.

Coke Chief Justice. The Judgment here is not to be maintained. It is not for the wrong, that the Judgment shall be (in misericordia.) In case of pleading, an Infant shall not be amerced, as in 16 Eliz. but if he comes to his full age, and doth not then presently confess, he shall then be amerced for the delay. And so it was held clearly by the Judges, when I was a Reporter in the Court of C. B. the Husband to be amerced, and for the battery of the Wife, the Judgment to be quod capiantur, and if so, a fortiori here, in misericordia shall be for both of them; here they were both of them requested to deliver the goods; and afterwards the Wife converted them.

Also there ought here to have been a Judgment for this (for which eat inde fine die) as to the 40 l. for there is 40 l. with an addition, and 40 l. without an addition, and this Judgment is for 30 l. parcel of the 40 l. in pecunijs numeratis. As to the Venire facias (touching the Ward.) A Ward to common intent is more than a Parish; but we are not to intend pluralities, and it belongs to the other side to prove this to be so. Where a thing is laid to be in a Parish and Ward, the Venire facias there shall be De Parochia, we are not here to intend a plurality; the Venire facias here was well awarded, for we will intend this Parish to be within the Ward, if the contrary both not expressly appear to us, that there is a plurality of Wards. We are not to shake a Verdict, if it be not for good and sufficient cause in Law to us shewed. But the chief matter here, for which this Judgment is erroneous, and that very clearly is this, because the Husband being requested to deliver the goods, with his Wife, and refused, and the Wife alone (is in misericordia) whereas the Husband and his Wife ought both of them by the Judgment to have been in misericordia.

If a Writ of Error be brought by two, one of them dies, the Writ shall abate by 3 H. 7. fol. 1. b.

The whole Court agreed this Judgment to be erroneous, because the Wife Judgment reversed, &c. alone, and not the Husband, was in misericordia, and for this Error, by the Rule of the Court, the Judgment was reversed.

### Thomas Long Plaintiff against Elizabeth Baker Defendant.

In an Ejectione firmæ, upon a Lease made by Sir John Brown, for the term of 10 years, the title of a Copyhold Estate, upon Non culp. pleaded, a trial was had at the Assizes in Comitatu Dorset. The Jury found a special Verdict, upon which Verdict the Case appeared to be this; That a Colledge dissolved by the Statute of 1 E. 6. between the Statutes of 37 H. 8. cap. 14. and 1 E. 6. did grant a Copyhold Estate in reversion, there being one in possession, whether this be a good grant or not? and whether a Copyhold Estate be within those Statutes, or not? Ejectione firmæ  
1 Ro. Rep. 202.  
Stat. of 37 H.  
8. &c.

This matter rests upon these two Statutes.

It was urged, this grant to be merely void, upon the Statute of 37 H. 8. and not revived by 1 E. 6.

It was further urged, Whether the Statute of 37 H. 8. should extend unto an Hospital, that was not dissolved by the Kings Commission; but afterwards by the Statute of 1 E. 6. as touching avoiding of Leases, the words of 37 H. 8. were observed, containing in them two Clauses. (S.) 1. Inheritance or Franchises. Secondly, Leases or Grants, or otherwise, which (as it was urged) should extend unto Copyholds.

Coke Chief Justice. It hath been resolved, that if they were not dissolved by 37 H. 8. then these Leases not to be avoided.

Dodderidge Justice agreed herein, and demanded whether they would avoid such grants?



grants : which they could not do, for that this Statute did not go unto customary Estates, and so was it held.

17 Eliz. *Hafelbridges Case.*

17 Eliz. in *Hafelbridges Case*, where the condition was, that he should not grant arte vel ingenio, that this should not extend unto Copyhold Estates granted.

Coke. The Statute was made for the benefit of the King ; and if so, not to be extended unto Copyholders, granted, and no grant to be avoided by the said Statute, but against the King. And this I have known to be so resolved upon the Statute, and not as to others.

Stat. of 31 H. 8. cap. 13.  
Coke 3 pars. fol. 8, 9. &c.

It was urged, that in the Statute of 31 H. 8. cap. 13. Of Monasteries, in the end of it (S) placito 13. There is a Proviso, that the same shall not extend to Copyhold Estates, to Grants by Copy ; and to this purpose see *Heydons Case*, Coke 3 pars. fol. 8, 9. and as touching the Statute of Limitations, a Copyhold Estate is not within it.

But if a Statute be made for the peace of the Kingdom, and without any prejudice to the Lord, a customary Estate shall be within this.

Coke 9 pars. fol. 105. &c.

Coke 9 pars. fol. 105, 106. in *Margaret Podgers Case*, whether a Copyhold Estate be within the Statute of 4 H. 7. cap. 24. Of Fines ? and there within what Statutes such Estates shall be.

Coke 4 pars. fol. 24. *Murrels Case*, by the severance of the Inheritance of the Copyhold from the Manor, the Copyhold is not by this destroyed.

Coke 8 pars. fol. 63, 64. in *Swaynes Case* to the same purpose, touching a Copyhold Estate, and the firmness of it.

As to the words in the Statute of 37 H. 8: Leases and Grants ; it was urged, this to be extended to things of the same nature, (S.) to Land at the Common Law.

Coke. If a Parson or Chantery Priest make a Lease for years, this is void by his death, but if for life, then voidable. If such a one before the Statute of 1 E. 6. had made a Feoffment in fee of parcel of his Glebe, or a Lease for life ; after comes the Statute, the King shall avoid this. This would make a great garboil in the Commonwealth if such Grants by Copy should be avoided.

Stat. of 4 H. 7. c. 24. &c.

As to that which hath been urged out of the Statute of 37 H. 8. Leases or Grants, or otherwise (that this word otherwise) should be extended unto Copyhold Estates ; this cannot be so, but to be intended of Land at the Common Law, and not to Copyhold Estates, which are not within that Law.

The whole Court agreed with him herein.

*Dodderidge*. Before 37 H. 8. made, a Lease made of the Manor of Dale, of which J. S. is a Copyholder ; the Lessee of the Manor grants this Copyhold, then comes the Statute ; by this the Copyhold Estate shall not be overthrown. No more shall it be in this Principal Case, so that the whole Court did overrule this Case ; that a Copyhold Estate was not within the Statutes Of Monasteries and Chantries, to be avoided by any of the Statutes.

### *Atkinson Plaintiff against Buckle Defendant.*

A Writ of Error.

1 Ro. Rep. 312.

1 Ro. Abr. 464.

**I**N a Writ of Error to reverse a Judgment given in the C. B. in an Action upon the Case for a promise, where the Case was, that Buckle the Plaintiff there being a Boat-man ; Atkinson did contract and agree with Buckle for the carriage of 100 Quarters of Barley, and did assume and promise to deliver unto him the 100 Quarters of Barley on Shipboard, at Barton Haven in the County of York,

to carry this for him, and for the carriage of it, he did assume and promise to pay him so much; and the other did assume and promise to carry the same for him, for so much as was agreed between them; the which he did assume to pay; Buckle accordingly brought his Ship to the said Haven, expecting there the delivery of the 100 Quarters of Barley to him, but the other came not at all to deliver the same to him; upon this Buckle brought his Action of the Case upon the promise, and upon Non assumpsit pleaded, he had a Verdict and Judgment. For the reverting of which Judgment, a Writ of Error is brought.

First Error, Civitas Eborum, on the margin, 1. Error, because it is not shewed, that this is a County in it self; nor yet is it shewed, in quo comitatu civitas eborum est.

The whole Court over-ruled this to be no Error, for that as Judges we know this.

Coke Chief Justice. If one do promise to deliver so much to such a one, he ought to seek him out, to deliver this to him; here in this Case, the one hath undertaken to come with his Ship to Barton Haven to carry the 100 Quarters of Barley, and as he by his Assumpsit, is bound to come thither with his Ship, so the other is also bound to come thither with his Barley, 9 E. 4. fol. 3. b. 4. a. the Case of the Well-Founder, and so the Case of the Taylor, who is to measure the Cloth; for that every one is bound to do that which properly belongs to him to do. If one assumes to pay unto another so much within a year, but no certain time limited when this shall be, he ought here to give him notice of the time when it shall be, that so he may then attend it.

A second Error, the Issue was Non assumpsit, if no good breach by him laid, then there was no cause of Action for him to have; this he hath not done, having not shewed any place where Barton Haven is, as he ought to do, for this may extend it self into divers Counties: To this it was answered, that it is laid to be at Barton Haven, in comitatu Eborum.

Coke, 7 H. 6. An Action of Trespass brought, for a Trespass done in portu de Cicester; and no Town laid, the Venire facias shall be de Cicester, the contrary shall not be intended, if it be specially shewed; so that clearly this is no Error; for we are not to intend pluralities.

The whole Court agreed, the Judgment to be well given, and no ways erroneous. And so by the Rule of the Court, the Judgment was affirmed.

Judgment affirmed per Curiam.

Moodie Plaintiff against Garnance Defendant.

Entred Trin. 13 Jac. B. R. Rot. 1055.

In an Ejectione firmæ, upon a Lease made by Thomas Cordell, for trial of a Title, upon Non culp. pleaded, the parties were at issue, and went to trial at Norfolk Assizes, where the Jury upon the Evidence given, found a special Verdict, which was to this effect, (S) That Thomas Cordell was seized in fee of an acre of Land, and likewise possessed of another acre of Land for years; That he made a Lease of both these acres to the Defendant for 21 years, rendering one entire rent of 61 l. at the usual Feasts, &c. upon condition in this manner (S) Provided always, if it shall happen the said rent to be behind by the space of 40 days after the days in the reservation, for payment thereof, &c. That then it shall be lawful for the said Thomas Cordell and his Heirs to Restrain, and not being sufficient on the ground, to re-enter into the demised premises.

Ejectione firmæ.  
Cro. Ja. 390.  
Mo. 848. n. 1151.  
1 Ro. Rep. 330.  
367.  
1 Ro. Abr. 410.

Two

Two Points moved in this Case. — (S.)

1. Whether this Proviso do make a Condition, or not?

2. If this be a Condition, then whether it shall be here appoitioned: the Fee-simple Land being to go to the Heir, and the Lease for years to the Executor; then whether the word Restrain shall be said to be of the nature of Distrain: whether this shall be a sufficient word to make a Condition?

It was urged for the Plaintiff, that this should make a good Condition: for that every Distrain is a Restrain.

6 E. 2. Fitz.  
title Entric,  
&c.  
8 E. 3. Coke.

6 E. 2. Fitz. title Entric congeable placito 55. and put in the Commentaries, fol. 159.b. in Throgmorton and Traces Case. If the Feoffor doth pay such a sum, quod tunc bene licebit for him, recipere terram, this taken to be as a re-entry, and so 8 E. 3. if the Rent be behind, that the Land shall return back again; this is a Condition to give a re-entry.

Coke 10 pars, fol. 130. Osburnes Case, Unproper words to be taken for proper words.

Coke, 10 pars,  
fol. 130 &c.

10 E. 4. fol. 4. Brook title Leases, placito 30. Brook title Licenses placito 19. & 5 H. 7. fol. 1. a License taken for a Lease, and so a Reversion; by the word Remainder, where the sense and meaning carries it so.

Coke 4 pars,  
fol. 119. &c.

2. It was urged, that the Condition here should be appoitioned, as Coke 4 pars, fol. 119. in Damparts Case, not by the act of the party, but by the act of Law; and in two Cases a Condition may be appoitioned; as there appears, and this very Case is one of them there put; and with this agrees 24 H. 8. Dyer, Rushdens Case, and 14 Eliz. Dyer, fol. 309. Also by the act and wrong of the Lessor himself, there shall be an appoitionment.

Coke Chief Justice. Here the Rent is reserved to be paid at two Feasts; and if it be behind, it should be lawful for him to restrain; and if not sufficient, then to enter, Distringo & Restringo are not proper Latine words, never mentioned in Tully.

The Court demanded, Whether the Jury had made any appoitionment of the rent, or not?

Coke. If a man makes a gift in tail of two Acres, reserving a Horse, one of the Acres being Borough-English Land, and the other Land at the Common Law; he shall not multiply the Horses, clearly he shall pay one Horse, for which of them he will, but not two Horses.

Dodderidge Justice. In things which are odious in the Law, as Conditions in this Case, we ought not by construction to make restrain all one with distrain, but in other matters, we may do this very easily.

8 E. 3.

Coke, 8 E. 3. If rent be behind, that then the Land shall return again, this in Case of a Condition, and shall be taken for a Condition.

9 H. 6.

Haughton Justice, 9 H. 6. Renunciavit Communiam, not shewing to whom, this taken for a good release of it.

Coke. We ought to take this in a reasonable construction, and so by these words he may distrain.

Dodderidge Justice. In Case of settling of an Estate, if not sufficient. It should never trouble my Conscience to make (restrain) to be taken for (distrain) If it be not in a matter odious in Law as Conditions are.

Coke. As for the second part of the Case we do all of us agree in this clearly, upon the appoitionment of the Condition, that by the act of Law this may well be, and no doubt there is of this, and notwithstanding it be here, that he shall (restrain) yet by the Common Law of the Land he may well distrain, and the Proviso, if he do not pay, makes a Condition, for which he may enter.

The whole Court, vivus redditus, we will always favour this. But not the Condition, more than the Law will.

The



The Jury here hath found, that there was no sufficient Distress, for the money of the Rent: And so without any further debate, this Case was adjourned over to be argued again, and for the Court to be better advised herein.

Afterwards, (S.) Termin. Pasch. 14 Jac. B. R. this Case was moved again, and argued at the Bar. Term. Pasch.  
14 Jac. Sec.

Coke Chief Justice. This condition is absurd, and repugnant in it self: He may distrain, but not by this condition; by the word (restrain) he may distrain 11 E. 4. every restraint of liberty is an Imprisonment; that he shall restrain the cattle upon the Land, this is good; but here it is, that he shall restrain, (quid?) nothing is mentioned for him to restrain, and so not good, as the word recipere, if he doth not say the Land, (S.) (recipere terram) this is not good: here it is, that he shall restrain, because nothing is here mentioned for him to restrain.

If it be said, that it shall be lawful for him recipere, he ought also to say, terram predictam, or not good; if such pleading should be suffered, this were the way to bring in Barbarism.

Also it is here further said, If there be not sufficient, and doth not shew what.

Also it is said, (S.) The Lord to re-enter into the demised premises, this is very insensible, and no ways to be made good.

As to the other matter, if the Case here would bear it, the act of Law would divide the condition, 4 Affix. the Jury are to set down the rent arrear; but when one doth demand a rent upon a condition, there he ought to be sure, as it were, to hit the Bird in the eye; the just sum to be demanded, or not to re-enter, for conditions are obvious in the Law, and are therefore to be taken strictly: here the condition is universal, without any conclusion at all, which is very absurd; there is a remedy by Distress, or by Action of Debt for rent.

Croke Justice. He would here re-enter without shewing any certainty at all for what, this condition here is insensible.

Dodderidge & Haughton agreed herein, that this condition is not good, but very absurd and insensible.

The whole Court agreed all in opinion against the Plaintiff, and accordingly Judgment, &c. the Rule of the Court was, (S.) Quod querens nil capiat per billam.

Nota. That in this term, upon the death of old Fetherstone, the chief Crier of the Court, his Son was by the Court admitted, and sworn in his place, to be the principal Crier of this Court.

Coke Chief Justice. It appears by the resolution in 36 H. 6. That the gift of this place of Crier of right belongeth to the chief Justice; and so it is there resolved, yet I will not oust an Officer of this Court, after so long a possession in the Father: But (with a Salvo jure) I shall give my consent to have him now admitted into the same place, he being the Son of our old Officer now dead, and he also having a Patent from the King of this Office for him and his Son.

And so the Court did admit him (with a Salvo jure) notwithstanding the said Resolution by all the Judges in 36 H. 6. and so in this manner he was by the Court admitted, and sworn to execute the place of principal Crier of the Court.

*Farrar Plaintiff against Snelling Defendant.*

**I**n a Writ of Error to reverse a Judgment given in the C. B. in an Action of Covenant, which Covenant was for the payment of yearly Annuity of 20 l. this behind for four years and a half: In Covenant for non-payment of this, being behind, the which amounted unto 100 l. in toto, and so in this misrecites it

(in 10. l. more than he ought to have) resolved there to be good by the Judges; the Court there agreed this to be good, and the Plaintiff there to have no more than what of right he ought to have; this mis-recital was assigned for Error, to reverse the Judgment there given.

Coke Chief Justice. This is no Error, for in this Action he is to recover nothing, but all in damages; and nothing in damages shall be allowed unto him, for the overplus; but otherwise it shall be, where it is so in Debt for Rent, upon a Lease for years: And so the difference will be plain between Debt and Covenant, for that in an Action of Covenant, damages only are to be recovered, and to be struck off for the overplus.

But if one brings an Action of Debt for Rent behind, and demands more than he ought to have, this shall abate his Action; otherwise in Covenant, (unless that the Writ of Enquiry of damages issued, and enquiry made of the Surplusage also, and damages for this given.)

It was also resolved this Term at Serjeants-Inn: If in an Action upon the Case, upon an Assumpsit, to deliver divers things which amount to so much; if in an Assumpsit in his demand, he doth over-reckon this, yet adjudged, that he should have his Judgment, this being only to recover damages, and good for that which he ought to have, and to be struck off for the residue.

Judgment  
affirmed.

The whole Court agreed, That in this principal Case the Judgment was not erroneous, and so by the Rule of the Court, the Judgment was affirmed.

### The KING against the Bishop of Durham.

A Quo Warranto.  
20. Durham.  
1 Ro. Rep. 399.  
1 Ro. Abr. 540.

**I**n a Quo Warranto, to shew how he claimed to have the goods of Felons, and of Felons de se, and of persons that stand mute within his Manor of Dale; he shews that Durham is a County Palatine, and that he hath Jura regalia, temps dont memorie, and that this Jurisdiction doth extend it self inter Tyne & Tese, and that this Manor is within the same; upon this Plea, a Demurrer joyned.

Coke Chief Justice. If he prescribes in a County Palatine, and to have Jura regalia within this; this for matter of Treason, and extends to all which the King himself may have, 11 H. 4. By the Grant of Felons Goods, such a Grant shall not have the Goods of those which do stand mute; yet, in a County Palatine he shall have these, if within the County Palatine; and this is as clear a Case as may be, this is alledged to be within the Manor of Seton, inter Tyne & Tese, which Manor came to the King by Attainder, and he granted this over, and that the Bishop of Durham hath this.

Dodderidge Justice. Others also have Land within the County Palatine.

Coke. If I have Felons Goods within the Manor of another, and he Grants this Manor to the King, I shall not by this lose the Felons Goods that I have.

Dodderidge. No Jurisdiction is to have any force against the King, as I have seen it in a Record, in 5 E. 2. between the King and the Bishop of Durham, but it is not so here.

The Court gave time in this Case, to shew good cause the next Term, or Judgment to be given for the Bishop.

Term. Trin.  
14 Jac. 8cc.

Afterwards, (S.) Termin. Trin. 14 Jac. B. R. this Case was moved again.

1. It was urged, That the Bishop could not have Goods of Felons by Prescription.

Coke

Coke & Dodderidge. Though one cannot have the Goods of Felons by Prescription, yet the Bishop having a County Palatine, he may very well have these, for he hath Jura regalia within his County Palatine.

2. It was then secondly urged against the Bishop, That if he shall have Felons Goods, yet he shall not have the Goods of Felons de se, for this is a special Felon.

Coke. I agree, That by the Grant of Goods of Felons, the Goods of Felons de se shall not pass; but otherwise it is in Case of a County Palatine, where he hath Jura regalia, and so shall have the Goods of Felons de se.

3. It was thirdly urged against the Bishop, That the place where he claims to have this liberty, is a Manor, and so this liberty shall extend only unto the Demesns.

Coke. He shall have the Clicheats of his Tenants for Treason (unless it be of an Estate-tail) which by Statute is given away, and therefore it is clear, that the liberty extends further than the Demesns.

4. It was fourthly urged against the Bishop, That the place where this liberty is claimed, is the Manor of, &c. the which is the Manor of Sir Jerome Boes a Stranger, and therefore the Bishop cannot have this liberty within this Manor.

It was answered for the Bishop, that it is here averred, this Manor to be inter Time & Tefe, the which is so confessed by the Demurrer.

Coke. But we will yet be ascertained of this, before we give any Judgment herein.

It was then urged for the Bishop by Hutton Serjeant, that 46 E. 3. in Agards Office; in Scaccario there is a Record, where it was found upon an Issue, that the Bishops Jurisdiction did extend it self inter Time & Tefe.

And this appears to be so by the Statute of Prærogativa Regis, cap. 1.

Coke cited a Record which was read in Court, and it was 21 E. 1. Rot. Parliam. 21 E. 1. &c. menti 5. inter recorda turnis, that the Archbishop of York did excommunge the Bishop of Durham in remotis agendis, and sent his Summoners to the Bishoprick to pronounce this; and the Servants and Officers of the Bishop of Durham took the Summoners of the Archbishop of York and did imprison them, for that they would have pronounced this Excommungement against their Lord; upon this the Bishop of York did cite the said Officers to make answer to this, for which the Bishop of York was afterwards sued in Parliament, and fined at a great sum, and imprisoned for this; and he cited them for the Imprisonment, which was a Temporal matter; and the Archbishop of York had no Jurisdiction Temporal over another Bishop, but only Spiritual.

It is there said in this Record, That the Bishop of Durham Duplicem statum habet, (S.) Temporalem & Episcopalem, an Episcopal Estate, and the State of a Baron, and that he hath as large Temporal Jurisdiction as he hath Episcopal, the one being as large as the other, by reason of his County Palatine.

The Record, Incipit, (S.)

Episcopus Dunelmensis habet duos status, unus Episcopi, alter of a Baron, (this is so specified in the Record) (these were then called the Pleas of the Parliament.)

It is also there said in the Record, That this Jurisdiction he hath not only in his demesns Lands, but also the same doth extend it self to Time & Tefe, and this is the limits of his County Palatine, (12 Eliz. Dyer, fol. 289.) hath something as touching this.

At this day, if one be there attainted of Treason, (if it be not an Estate tail) the Bishop of Durham shall have it.

There were in ancient time, Placita Parliamenti, (veritatis & vetustatis vestigia) and



and these matters which were not there determined, were sent to the Justices de B. R. to be by them determined.

Another Record was shewed for the Bishop of Durham, which was 46 E. 3. in Agards Office before remembred, Quod Episcopus Dunelmensis habet omnia jura regalia, quæ ad comitatum Palatinum pertinent; and by this he claims to reverse Errors; for this see 14 E. 3. tit. Errors.

Coke. I have a note of a Claim of the Bishop of Durham, in 25 E. 1.

Dodderidge. In 5 E. 1, There was a great Case between the Bishop of Durham and a Prior.

Judgment  
given for the  
Bishop.

The Court clear of Opinion, That the Jurisdiction of the Bishop of Durham did extend it self throughout the whole County, and the Plea of the Bishop allowed by the Court; and so by the Rule of the Court Judgment was given, and so entered for the Bishop.

### *Wrathbone Plaintiff against Newbery Defendant.*

Trespas and  
Ejectment.  
1 Ro. Rep. 287.  
1 Ro. Abr. 850.

**I**n an Action of Trespas and Ejectment, to try the title of a Lease made by a Parson of his Rectory: The Case appeared to be this, A Parson made a Lease of his Rectory to one for three years, and so from three years to three years, and so from three years to three years, during his life.

The whole Court clear of Opinion, that this is a good Lease for twelve years.

Dodderidge Justice. If he had said, and so from the said three years, for three years, this had been a Lease but for nine years, but the same being, as before is expressed, it shall be a good Lease for twelve years.

28 H. 8. Dyer,  
fol. 24. &c.

See for this in 28 H. 8. Dyer, fol. 24. and Plowdens Commentaries, f. 273. b. bottom, by Brown and Dyer, in Say and Fullers Case.

### *Krowl & Al. Plaintiffs against Harvey Defendant.*

A Prohibition.  
1 Ro. Rep. 335.  
2 Ro. Abr. 813.

**I**n a Prohibition, the Case appeared to be this: A Vicar lops and cuts down Timber-Trees growing in the Church-yard: The Church-wardens hinder him in the carriage of the same away, and they being in trial of this suit: The Church-wardens by their Council, moved the Court for a Prohibition to the Vicar, to stay him from felling any more.

Coke Chief Justice. This is a good cause of Depprivation, if he fell down Timber-Trees and Wood, this is a Dilapidation, and by the Resolution in Parliament, a Prohibition by the Law shall be granted, if a Bishop fells down Wood and Timber-Trees.

The whole Court agreed clearly in this, to grant here a Prohibition to the Vicar, to inhibit him not to make spoil of the Timber, this being (as it is called in Parliament) the endowment of the Church.

Coke. We will also grant a Prohibition to restrain Bishops from felling the Wood and Timber-Trees of their Churches.

A Prohibition  
granted, &c.

And so in this principal Case, by the Rule of the Court, a Prohibition was granted.

The

The Spanish Ambassador, by the name of *Don Degoe Servient de Acuno*, Plaintiff, against Captain *Gifford* Defendant.

**I**n an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict 1 Ro. Rep 339. was found for the Plaintiff; the Case appeared to be this: The King of Spain did give unto Captain Gifford, Decem mille Ducatus monetæ, for to go for him in bello against the Barbarians before such a day; the Defendant did assume and promise; that if he did not go before the day, he would then repay the money; he did not go, nor yet pay the money according to his promise: upon this the Spanish Ambassador, for the King of Spain his Master, brought the Action upon the Case, and a Verdict found for the Plaintiff.

It was moved for the Defendant in arrest of Judgment by Harris Serjeant, touching the consideration, being in consideration of Decem mille Ducatus monetæ, of the value of 5 s. 6 d. every Ducker, and doth not shew when they shall be of such a value, for they may be more, or they may be less.

Dodderidge Justice. They are to be of this value at the time of the payment.

The whole Court agreed in this, that the Jury may give more or less than the value in damages, if they will.

Coke Chief Justice. If one do assume to pay to another Decem mille Ducatus monetæ, and every one of them to be of the value of 5 s. 6 d. this ought specially to be averred: Here the promise was, that if he did not go before the last day of June, for the Spaniards against the Barbarians, then he would repay the money: If he goes not, this ought then to be repaid within a convenient time after the day past, and he go not: No request is to be made of this, neither ought the Plaintiff to seek him, but at his peril he ought to pay this without any request.

If one do promise to pay so much at his coming from Rome to another, he shall have a convenient time to pay this after his return from Rome, and this payment is to be without any request; here the Case is upon Non assumpsit pleaded, and a Verdict against him, that he did assume & una lex alienigenis & indigenis: And therefore by the Rule of the Court, Judgment was given for the Plaintiff, and a Capias granted to take the Defendant.

The first thing I noticed when I stepped out of the train was the cold. It was a sharp contrast to the warm interior of the car. The air was crisp and clear, and the sun was shining brightly in the sky. I felt a sense of freedom and adventure as I stepped onto the platform.

I had heard that the weather in March was just what I needed. It was not too hot, not too cold, and the humidity was just what I needed. I had heard that the humidity was just what I needed. I had heard that the humidity was just what I needed. I had heard that the humidity was just what I needed.

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# Termino Paschæ,

14 Jac. Banco Regis.

*Randal Cook* Plaintiff against *Matthew Lancaster*  
Defendant.

Entred Termin. Trin. 13 Jac. B. R.  
Rot. 80.

**I**n an Action upon the Case, upon an Assumpsit, for the delivery of Corn; upon Non assumpsit pleaded, a Trial was had, and a Verdict given for the Plaintiff. 1 Ro Rep. 353.  
1 Ro. Abr. 202.

Richardson Serjeant moved the Court for the Defendant in Arrest of Judgment, for a variance between the Writ of Nisi prius and the Record, in matter of substance, and not amendable, being the day of the Assumpsit, which was such a day, 10 Jac. in the Writ of Nisi prius, and in the Declaration upon the Record, said to be such a day, 11 Jac. and the party that made the promise was dead; and this Action is brought against the Executor; this mistake is matter of substance, and so not amendable, for by this mistake the very matter is altered; and to this purpose is the Case in 11 H. 6. fol. 11. In Debt against J. S. Husbandman; there they were at Issue, whether he was Husbandman or Mercer, jour de brief purchase: In the Writ of Nisi prius for trial of this, (jour de brief purchase) was omitted, and not amendable, because matter of substance, and therefore a Venire facias de novo was there awarded.

And this is not like the Case that is in 9 Eliz. Dyer, fol. 260. placito 24, & 25; in a Writ of Partition by Wotton against Anthony Cook and Temple, who appeared; Temple confessed the Partition, Cook conveyed Title in severalty to the whole Land: there in the Record of Nisi prius, this word (Anthonius) by negligence of the Clerk of the Treasury, was omitted in the joinder of the Issue; this was there amended, being but a mere mispension.

Coke Chief Justice. If the Nisi prius vary from the Roll in a thing which doth alter and change the Issue, it is plain that this shall not be amended; but times are not always matters of substance; but in the principal Case here, the same is matter of substance, and so not amendable.

Pasch. 20 El. 3. Fitz. tit. Amendments, placito 37. a good Case upon the same difference, where it is matter of substance, and where not: If matter of substance, then the same is not to be amended.

It hath been taken, that if one do bring an Action of Trespass, for a Trespass done 1 Maij, and this was done 3 Maij, that this had been a material matter to make

all to be bad, but as to this, I think that in this Case the day is not material, as matter of substance, but the same shall be good, if it be so, that in such Cases he hath good cause of Action before his Action brought; and so it hath been often times adjudged. Here in this principal Case, there is another matter which is material, and makes the matter bad.

Judgment  
stayed per Ca-  
riam.

Here it is *Randolpho* for *Randall*, where there is not any English name for *Randolpho*, there is *Ranulphus* for *Randall*, and *Randolphus* for *Rafe*; but *Randolphus* is not good; and when I was a Pleader, in an Action of Debt upon a Bond, in such a Case here, *Non est factum* pleaded and avoided, for this cause only, (of *Randolphus*) for *Randall*; here in this principal Case, the day is a material part, and makes an alteration of the Verdict. And therefore by the Opinion of the whole Court, this is not to be amended; and for this cause, by the Rule of the Court, the Plaintiffs Judgment was stayed.

*Bagge* Plaintiff against *Slade* Defendant.

Entred Mich. 11 Jac. B. R. Rot. 872.

A Writ of  
Error.

1 Ro. Rep. 354.  
1 Ro. Abr. 20.

**I**n a Writ of Error to reverse a Judgment given against him in an Action upon the Case for a promise. In the Town-Court of Yevell, in Comitatu Sommerset. The Error assigned and insisted upon was this, because there wanted a good consideration to raise the promise, and so no cause of Action.

Coke Chief Justice. The Case was this, Two men were bound in a Bond for the Debt of a third man; the Obligation being forfeited, so that they both of them were liable to pay this; the Plaintiff here in this Writ of Error said to the other, pay you all the Debt, and I will pay you the moiety of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moiety according to his promise, which to do he refused; upon this he brought his Action upon the Case against the Plaintiff upon his promise; and upon *Non Assumpsit* pleaded, he had a Verdict and Judgment; and upon this Judgment a Writ of Error was brought. In this Case, and in the Declaration, there is a good consideration set forth; the parties own contract here shall bind him, he hath no remedy for the money paid, but when this is paid, here is a good Assumpsit grounded upon a good consideration for repayment of the moiety by the Plaintiff.

Haughton Justice. Notwithstanding this Contract, he is still left in danger of the first Bond.

Coke. I have never seen it otherwise, but when one draws money from another, that this should be a good consideration to raise a promise.

Dodderidge Justice. If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise.

Coke agreed with him herein: Also if a man be bound to another by a Bill in 1000 l. and he pays unto him 500 l. in discharge of this Bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said Bill of 1000 l. this 500 l. is no satisfaction of the 1000 l. but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid money, (S.) Five hundred pound, and he hath no remedy for this again.

Another matter was moved, that the entry of the Judgment was not good; the

the same being in this manner, (S.) Ideo consideratum fuit, ad tunc & ibidem, hic ad eandem Curiam, quod prædictus querens recuperet.

The whole Court agreed this Judgment to be well entered; and that the consideration here is good and sufficient to raise the promise, and accordingly the Rule of the Court was, Quod judicium affirmetur. Judgment affirmed. per Curiam.

Sir John Brett Plaintiff against Cumberland  
Defendant.

Entred Trin. 13 Jac. B. R. Rot. 1496.

**I**n an Action of Covenant, for not repairing of certain Mills to him demised for term of years. The Case was this, (S.) Quæn Eliz. was seised of these Mills, and 10 Julij, 26 Eliz. by her Letters Patents, she made a Lease of these Mills for 31 years unto William Cumberland, in which Letters Patents there was this clause (S.) for him, his Executors and Assigns, to repair the said Mills, and to leave them sufficiently repaired at the end of his term; afterwards this reversion came to the King, who did grant this unto Sir John Brett and his Wife, and for breach of Covenant, upon the clause in the Letters Patents, for not repairing of the Mills, the Husband alone brings this Action of Covenant.

An Action of Covenant,  
1 Ro. Rep. 359.  
Cro. Ji. 399.  
1 Ro. Abr. 517.

Upon a demurrer, the matter came to be argued, and the points insisted upon to be opened.

Four Points moved in this Case. (S.)

Points in the Case.

1. First Point, The Patent of the Lease was to have the same from Mich. following, and doth not say in the Letters Patents when this Lease should begin. It appears, that the next day after he entered by virtue of the Lease, so that this was to begin at Mich. he entering the day after, as it was urged.

2. The second Point, Whether these words having no express words of Covenant, shall be taken for a Covenant? It was urged, that these words in the Letters Patents should be taken for good Covenant, without express words of Covenant, for that every party to the Letters Patents shall be bound, as well as if the same had been by Indenture, to this purpose is 4 Maria Dyer, fol. 150. a Lease for life is made by Indenture, in which there are these words (S.) Provisum est quod, if the Lessee dies within the term of 60 years next ensuing, that his Executors and Assigns shall have this as in the right and title of the Lessee, pro termino totidem annorum, as shall amount to the number of 60 years from the date of the Indenture, there held by the Court, that this is but a Covenant, and no Lease; and so is 40 E. 3. fol. 5. sub conditione, taken there for a Covenant and not a Condition; and because the matter here is to be done at the end of the term, that in this Case this shall be a Covenant, being an agreement.

4 Maria Dyer,  
fol. 150.

40 E. 3. f. 5.

3. The third Point, Whether an Action of Covenant lies, without sealing of the Counterpart? It was urged, that an Action of Covenant well lieth, and to this purpose was cited the Case of 38 E. 3. put by Knightley, in 28 H. 8. Dyer, fol. 13. placito 66. and so it is also in the Book at large, a Feoffment made by Deed, with divers Covenants, and one of the Feoffees seals this, and the other not, but yet occurs and survives, adjudged, that he shall be bound by the Covenants, and seal of his Companion. H. Littleton also hath the same in his Chapter Of Conditions, fol. 88. placito 374. An estate for life made by Indenture, the remainder over, upon certain conditions, Tenant for life puts his seal to part of the Indenture, and dies; he in remainder enters by force of the remainder, he is bound to perform the conditions

38 E. 3. citè  
28 H. 8. Dyer,  
f. 13. &c.

Littleton, &c.



ditions in the Indentures, as well as the Tenant for life, and yet he never sealed, 59 E. 3. fol. 22. and so is 59 E. 3. fol. 22. the reason is, because he takes by the writing in which the Covenant is comprised, and therefore he shall be bound by the Covenant.

4. The fourth Point. The Action of Covenant is here brought by the Husband alone, without his Wife; whether this be well brought, or not? It was urged, that this Action is well brought by Husband alone; for in all Cases where the thing to be recovered, is in the power of the Husband to make a present disposition thereof, in such a Case he may bring the Action in his own name, without his Wife; upon this reason is the Case in 37 Affisar. placito 11. the Husband without his Wife shall sue to the King by Petition, because he may make disposition of the thing sued for, which he had in right of his Wife; to this purpose is 2 H. 4. fol. 7. 38 H. 6. fol. 3. & 4 E. 3. fol. 13.

37 Affisar. placito 11.

2 H. 4. fol. 7. 38, &c.

Coke Chief Justice. You shall seldometimes see Leases by Indenture, made by the King, but by his Letters Patents; this is a Covenant here by agreement, 38 E. 3. in the Book at large before remembred, though not sealed the Counterpart, yet a Covenant.

37 Affisar.

As to the later Point. The Husband alone may well have this Action, or if he so will, he may join his Wife with him, 37 Affisar. the Husband alone may have an Ejectione firmæ; the Husband hath a term in right of his Wife, he is ousted of it; he brings his Action, and recovers the same again, and hath his Judgment; how shall he be now possessed of this? he shall have it statu quo.

In this principal Case, I hold it to be a very strong Case, that the Action of Covenant here brought by the Husband alone is well brought, though the interest in the reversion was in him and his Wife, and there are express Words in the point, that he may either join his Wife with him, or bring the Action alone.

Dodderidge Justice. This is to be observed for a rule, (S.) That which the Husband may discharge alone, and of which he may make disposition to his own use. For the recovery of this, he may well have an Action in his own name without his Wife.

Coke agreed herein, That this is a true and a good ground.

Haughton Justice. Here he is to have the Covenant of an Assignee of the Reversion, and this was assigned to him jointly with his Wife, and they are Assignees of the Estate, and for this cause the Wife ought to be joined with him in this Action.

Dodderidge. He may join her with him in the Action if he will, or sever. And the Action, as it is here brought by him alone, is well brought, and that also because he only here is to have all the profit, and therefore this Action brought by him alone is well brought.

29 E. 3.

Coke agreed with him herein, and this to be for a Rule observed, that where the Husband is to have the sole profit of that which is to be recovered, and may himself alone discharge this, there for recovery of this, the Husband alone may have his Action, as here in this principal Case he hath done, and the Action of Covenant here by him brought, is well brought. If Baron and Feme do join in a Lease of the Land of the Wife, rendering rent, the Husband doth release the rent, and dies. Whether this be gone, or not? by 29 E. 3. the rent is not gone.

The whole Court (except Haughton) did hold it as a strong Case, that the Action of Covenant brought by the Husband alone, without his Wife, was well brought; But because Haughton of this dubitavit, therefore it rested upon a Curia advisare vult.

Afterwards this Cause was moved again, and it was urged for the Defendant, that there is no time limited when the Lease should begin, being à Festo Sancti Michaelis Archangelis, without saying adtunc proximi sequen.

The Court over-ruled this, being of no force; and it being alledged to be by force, where he entered the next day.

It was then urged, that this Action by the Husband alone, without his Wife, was not well brought, this being upon the Statute of 32 H. 8. the Assignæ of the King to have an Action of Covenant, and they are both of them Assignæ of the Estate; and therefore to joyn in the Action.

Coke Chief Justice. If one grants the Wardship of a Ward unto a Feme, it is adjudged, 29 E. 3. f. 48. in Simkin Simons Case, put in Spencers Case, 5 pars, f. 18. 26 E. 3. f. 48. &c. that the Husband shall have an Action of Covenant. And so it is also very clear, that if a Bond be made to Baron and Feme, the Husband alone for this may have an Action of Debt, and this doth induce me to be strongly of this opinion, that this Action of Covenant here is well brought by the Husband alone.

Haughton Justice. If the Case had been, that an Action by Statute Law had been given unto the Husband and Wife, they ought to joyn in the Action, and here they are both of them Assignæ.

Coke. This is for a Rule, where the Husband alone may have an Action, and the damages to be recovered, he alone to have them, there he alone may have an Action of Covenant, or Debt on a Bond.

But in all personal matters, to joyn his Wife with him, yet the baron sole may in such Cases release.

Haughton. In an Action of Waste, in the tenuit, he is to joyn his Wife with him; yet he recovers only damages.

Coke & Dodderidge. This is in the realty, and locum vastatum is there also to be recovered, and therefore they are to joyn.

But here this Covenant is at the Common Law, and an Assignæ may have benefit of any Conditions and Covenants at the Common Law; and the difference in this will be between a Lease for years and for life; in the last, the same is voidable, and there privies only are to have of this advantage.

The whole Court (except Haughton) were clear of Opinion, That the Action of Covenant here was well brought by the Husband alone, without his Wife; and so the Rule of the Court was, Quod judicium intretur pro querente:

Judgment for  
the Plaintiff,  
per Curiam.

### Witt Plaintiff against Buck Defendant.

In a Prohibition upon the Statute of 2 E. 6. cap. 13. the claiffe touching barren and heath ground, of which, after Improvement, no Tythes to be paid during the space of seven years after the Improvement; for the Prohibition, it was shewed by Trotman, that this Land for which the Parson libelled for Tythes, was marsh and sandy Land, and covered with salt water, so that time out of mind no Grass had been there known to grow, nor any profit at all made of this, until now of late time, by and with the great costs, charges, and industry of the Tenant; this ground had been lately gained from the Sea, and from its overflowing, by repairing and making new Banks and Sea-walls, and by continual repairing of them, and so he had now converted the same into arable Land, whereby he had Coyn, and of this Land the Parson libels for Tythes in the Spiritual Court; and upon this matter thus shewed, a Prohibition prayed, being to be discharged from payment of Tythes for this ground for seven years; this Statute being thus made for the encouragement of Tenants to make improvements of their Lands.

Prohibition  
upon the Sta-  
tute of 2 E. 6.  
1 Ro. Rep. 354

Coke Chief Justice. It was resolved in one Farringtons Case, upon this Statute of 2 E. 6. That Wood ground is not barren ground within this Statute, this was there adjudged in point, that if one do stock and grub up Wood ground, and after

after converts this into arable ground, he hath by this meliorated his Land, but this with great cost and labour, yet he shall pay Tythes for this ground presently; for that Heath and barren ground, intended to be within the Statute, the same ought to be such Land which is suapte natura sterilis, and barren.

Dodderidge Justice. A salt Marsh, if this be fenced, and so made good Meadow, clearly he shall pay Tythes of this presently; yet before this was so fenced and made firm, no Tythes were to be paid of this.

Coke. The life of Dogs, (juxta Greenwich) they are at great costs and labour, and that continually to keep and uphold this, yet they are to pay Tythes for this; here it appears unto us, this to be very good Land, but all the charge is, in the gaining and defending of this from the overflowing of the Sea (this Land shall be out of the Statute, out of the clause of discharge for seven years, notwithstanding this charge the Tenant hath been at in gaining of this Land from the Sea) for to have this to be within the Statute, and the clause of discharge, this Land ought to be suapte natura barren, which here it is not, but by accident, by the overflowing of the Sea thereon.

Haughton Justice. This Land, if the salt-water came not upon it, though it be sandy, would yet have borne good grass without any labour, for this is very good Land of it self.

Coke. If a mans Land be overflowed for two, three, or four years, during this time the Parson can have no Tythes here; but if he afterwards regain this his Land from the overflowing, though this be at his great charge and labour, and this afterwards by his industry bears Grass or Corn, he shall pay Tythes of this, for this barrenness, as here in this Case, is not so of it self, but by accident.

The whole Court agreed in this, That by this Statute barren ground is such ground as will not bear Corn of it self, without very great cost in the extraordinary manuring of it.

But if the same will bear Corn without any great labour and manuring (but only with charge in regaining of it from being overflowed) he shall pay Tythes for this presently, for the same ought to be suapte natura barren, or else the same shall not be within this Statute, and the clause of discharge: For if one do gain Land from the Sea, which afterwards bears good Corn, of this he shall pay Tythes.

The whole Court also agreed in this, That if one do gain Land from the Sea, and that by his great cost, and he afterwards turns this to arable Land, for this he shall clearly pay Tythes, notwithstanding his cost, and notwithstanding that time out of mind no grass had been there growing; yet because the same is not barren Land of it self, but only by accident, (S.) by reason of the sand and salt-water flowing over it, therefore so soon as this shall be regained and sown with Corn, Tythes shall then presently be paid for this Land, for this Land bears good Corn, being regained, and that without any marling, or any great cost in manuring of the same, which proves evidently that this is not barren ground within the scope, intention and meaning of the said Statute, by which the same ought to be suapte natura barren, or not within the Statute.

And in all this the Court agreed clearly, and therefore the Case appearing to be thus, that this is no such barren ground within the Statute, as ought to be discharged from payment of Tythes, but Tythes ought to be paid for the same, and that the Parson had just cause to sue there for his Tythes, and so a Prohibition denied by the Court.

Sir



Sir Harbert Crofts Plaintiff against Brown  
Defendant.

**I**n an Action upon the Case brought for scandalous words, spoken by the Defendant of the Plaintiff; upon Non culp. pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the words spoken were not actionable.

Action upon  
the Case for  
words.

The words being these, Sir Harbert Crofts keepeth men to rob me, (the truth appeared to be, that the Defendant was robbed, and that by two of Sir Harbert Crofts men,) and upon this he spake the words (but doth not say, that he did keep them to do so.) A Case was cited, where Sir John Harper was Plaintiff against Sir Francis Beaumont, in an Action upon the Case for words, which were, That Sir Francis Beaumont should come to the House of Sir John Harper, and that he and his Servants should go about to kill him, and that he did maintain them; but did not say, that he did so, to the same intent, nor that any thing was done: Upon motion in Arrest of Judgment, it was adjudged, that these words were not actionable.

It was urged by Coventry, That these words are actionable, and to this purpose divers Cases remembered which are put, Coke 4 pars. fol. 16. b. in Aton and Allens Case, as the Lady Cockeins Case, being my Lady Cockein offered to give poison to one, to kill the Child in her Body; and the Case of Tibbotts there remembered.

Coke 4 pars.  
&c.

The Court agreed this to be so, for there an act was done.

Coke Chief Justice. We will not give more favour unto Actions upon the Case for words, than of necessity we ought to do, where the words are not apparently scandalous, these Actions being now too frequent, but they were not so in former times, for from 1 E. 3. unto 5 E. 3. there are not three Actions upon the Case for scandalous words.

Here in this Case the words are very barely laid, (S.) He keeps men to rob me, Insidiator viarum.

In ancient time, by the Law, voluntas reputabatur pro facto, 3 E. 3. one lay in wait to kill another, and upon resistance hurts him, but doth not kill him; this was Felony by the Common Law, and ousted of his Clergy; there it was once a Felony, but now the Law is otherwise, a fact is requisite to be done; an overt act makes Felony at the Common Law: And this which is Treason at this day, with an overt act is Felony at the Common Law.

But here in this principal Case there is no act done, no way-laying, no overt act; here it is to be intended his keeping of them to be lawful, (to rob me) this is but an intent, no act which is not Felony at this day, and therefore not actionable: And an intent without an act is not punishable by the Law, as it is resolved in Aton and Allens Case before remembered.

If one saith of another, You have murdered J. S. who is still living, these words not actionable, yet these are very bad words.

And so it was resolved, Hill. 39 Eliz. in the C. B. between Snag and Gee, in an Action upon the Case for words, being, Thou hast killed my Wife, and it appeared that his Wife was then living, and adjudged not actionable, Coke 4 pars. fol. 16. a.

Hill. 39 Eliz.  
C. B. &c.

Haughton Justice. If the words were, such a one did hire a man to rob me, these words would be actionable; but as the words are laid to be in this principally, I doubt whether they be actionable.

Coke. In the Case last put, there it is very plain that the words are actionable, for there an act was done by him, but not so here in this Case.

Curia. The reason, De scandalis magnatum is upon another ground, for that by reason of the words spoken, they bring them hereby in odium.

The whole Court was of Opinion against the Plaintiff, that these words are not actionable, and so by the Rule of the Court, Judgment was arrested.

*Allen Plaintiff against Wedgewood Defendant.*

1 Ro.Rep.373.  
1 Ro.Abr.421.  
424.  
Bridg.Rep.39.

**I**N an Action of Covenant, for not performing of certain Articles agreed between them according to the Covenant; one Article being, that the Defendant did covenant to make a Lease to the Plaintiff, or to his Assigns, for three lives, as he should name: He nominated himself and two others; the Defendant refused to make the Lease, whereupon the Action brought.

George Croke for the Defendant demurred in Law upon the Replication, because that no sufficient breach was assigned by the Plaintiff: The Lease to be made to him for three lives, which he should nominate, so that he himself ought to be one of the Lessees, and to have the sole interest.

Coke Chief Justice. To him or to his Assigns the Lease to be made, these to be such as he should name; the point here is, whether he hath here an election to make the Lease to him, or to his Assigns: it had been otherwise clearly, if it had been to be made to him and to his Assigns, but here he hath an election to him given, to whom he will make this Lease, as if you are to make a Lease to me, or three which I shall name.

They being in doubt, whether there was a Lease then in esse, or not: therefore for this there was an Article, that if there was a Lease in esse, then at the end of this, he was to make the Lease to him, or to his Assigns for three lives; and if no Lease was then in esse, then by another Article he was to make this Lease at the time prefixed.

It was urged, that this Lease ought to have been made to Edw. Allen, and such three lives as he should nominate, for that ex præcedentibus & consequentibus, a Deed ought to be construed; and to this purpose is 14 E. 3. Fitz. tit. Debt, placito 138. If one be bound to grant a Rent, he ought to grant this before Michaelmas day.

If a man be bound to make a Lease before the Feast of the Annunciation, to such a one as the Oblige shall name, he ought to name before our Lady-day: Also he is to nominate three persons, he ought to nominate them, and to say, that they were upon the Land ready to receive the Lease, being a Lease for three lives, as it was urged.

It was also urged, that he was to make such a Lease, as by Council was to be advised, this ought to be by the Council of him who was to have the Lease; this appears not to be done, nor any good nomination made, and so the Replication not good.

It was urged for the Plaintiff, that here he did nominate himself and two others, for the Lease to be made to them; the Defendant refused to make this Lease, and for this breach the Action brought.

As to the Exceptions taken to the Replication, (S.) 1. That the request is not laid to be in time: This is made pursuing the Articles of Agreement, and so made in due time.

Second

**Second Exception.** That the Assignés ought to be upon the Land to take the Lease; this is not to be so, the request is to be where the Defendant is, no place nor time being appointed; and so it was here, he brought the Assignés with him when he made the request, he ought then presently to have made the Lease, his asking the next, he ought to have gone to the Land, and if they came not to take the Lease of him, then he had been excused; but if he goes not to the Land, this shall be a breach.

To this purpose is 22 E. 4. fol. 43. A man is bound that a Stranger shall enfeoff the Obligé before such a day, he shews that the Stranger was upon the Land ready to make the Feoffment, and the Obligé came not to take it; so that he which was to make the Feoffment at his peril, ought to attend there to make it, because he is to make the Estate; so here the Defendant upon request made unto him, ought to go to the Land, to be there ready to make this Lease.

Coke Chief Justice. The time of the entry and the words here are material: If no Lease in possession, then to enter by the Articles at the Feast of the Annunciation of our Lady, which should be Anno 1612.

This is the Point. The Covenant is to make to you, or to your Assigns a Lease; &c. and to enter at our Lady-day next ensuing, and this is to be done upon request; it is to be to you, or to such as you shall name, and money to be paid for rent, and 20 l. to be paid at the Entry for a Fine or Income; this is to be done by the Lessee to the Lessor, and this is as much as that the Lease should be made before this Feast, and that you should name the persons to take before this time; but here you let the Lady-day pass, and two months after you nominate the persons, and request the Defendant to make the Lease, the which he refused, whereupon this Action is brought.

Here the Plaintiff who ought to have the Lease, hath not done well; if the other should make a Lease after the time past, this would be prejudicial to him, for he ought to have 20 l. given unto him at our Lady-day, being the time prefixed for his Entry.

As touching Cromwel and Androse Case, I heard that argued in the C.B. being then a Reporter there.

If one be bound to grant to another an Advowson, he hath time to do it during his life, if the other do not hasten it by request; but if it fall void, then he ought to grant it presently, for it is now a fruit fallen, and if it should be otherwise, it should be prejudicial to the other party.

And so if one be bound to grant a Rent to another, he ought to do this before the Rent-day come.

In this principal Case here, you are confined to nominate before the Feast of our Lady-day.

As to the other Point, (S.) the Lease to be made to him, or to his Assigns, or to pay to one, or to his Assigns.

The Law will never hunt for an Assigné in Law, where there is an Assigné in fact. A man doth Covenant to make a Lease to you, or to such as you shall name, you nominate such to go to the Land, and afterwards in time convenient to make the Lease: If one doth Covenant to make a Feoffment in Fee to another, this is to be done upon notice; here the Lease is to be made upon the nomination of the parties to take, where a time is set down for the Entry, as in this Case; the nomination ought to be before this time, and the Lease to be made also before the time.

As to the other Points moved, they come too late, this matter being very strong against the Plaintiff.

Croke Justice. This is a very strong Case against the Plaintiff; when is this 20 l. Income to be paid? at our Lady-day, when the Entry is to be by virtue of the Lease, this Lease is to be made before, so that the Plaintiffs request to have the



Lease made after the time past, this request comes too late. As to the other matter, (S.) The Lease to be made to him or to his Assigns, the Lease is to be made by Covenant. He may name all at the first that are to take, for that frustra fit per plura quod fieri potest per pauciora, the intention here was, that Edward Allen was to take originally; here the request to have the Lease made comes too late, and so no breach of the Covenant by the Defendant.

Dodderidge Justice. At the first it was indifferent to him, whether the Lease was made by him for the life of three, or to such three as he should name; it might be to himself, and to two others, or to three others, which he should name.

As to the other matter, he agreed in opinion, for that if he should make the Lease after the time past, he should by this lose his 20 l. absolutely: No entry being at our Lady-day, if the Lease had been made afterwards, he could by no means have his 20 l. and therefore he was not bound then upon this request after the time to make the Lease; the Plaintiff ought to have had the Lease drawn in time, and to have tendered the same unto him, which was not done in this Case; and the refusal here by the Defendant to make this Lease upon the Plaintiff's request, after the time, is no breach of Covenant, and so the Plaintiff had no cause of Action.

Coke. The Lease was to be made, as it should be advised by the Council of— not devised, but to be as effectual as might be advised by Council, and this to be to Edward Allen and his Assigns; he was to enter at our Lady-day, and then to pay the 20 l. the day past; no request made for the Lease till after, the Defendant then not bound by his Covenant to make it, for then he had no remedy for his 20 l. and so this refusal coming upon a request, after the time past, is no breach of Covenant, and so the Plaintiff had no cause of Action, Judicis officium est ut res, ita tempora rerum, &c.

The whole Court inclined to be of Opinion against the Plaintiff: And so for this time it rested upon a Curia advisare vult.

Afterwards this Case was moved again.

Coke. The Plaintiff here alledges, that the Defendant hath not made the Lease in June, according to his request, if no good breach assigned, no cause of Action, when he shall enter to pay the 20 l. that is, when he is to enter by their mutual agreement; and if the Plaintiff will not come, and request him in due time to make the Lease according to their agreement, he may well provide himself of another Tenant; the Plaintiff ought to have come upon the Land, and there to have been ready to receive this Lease, and so to enter; and here the Defendant is not bound to make the Lease by his Covenant, until the Plaintiff do nominate to whom the same should be made, and this nomination and Lease accordingly made, ought to be before our Lady-day, being the time certain prefixed for the doing of it.

Haughton. This Lease ought to be for three lives, and to be made at our Lady-day; and if the Plaintiff do surcease this time, and demands of the Defendant after this Feast to make this Lease; he is not bound by his Covenant to do it, and his refusal then to make is no breach of Covenant, to give the Plaintiff cause of Action.

The Court then said unto Bridgman, who was for the Plaintiff, that the Plaintiff might discontinue this Action, and that this would be his best way.

The Judgment  
of the Court  
against the  
Plaintiff.

Curia. We will be of this matter better advised, and by the Rule of the Court, the matter to rest as it is, and advised the Plaintiff and Defendant to make an end between themselves before the next Term, the Court being all clear of Opinion against the Plaintiff, and in default of an end, the Rule of the Court to be, Quod querens nil capiat per billam.

## The KING against Tavernier.

**R**ichard Tavernier was indicted, arraigned, and now tried at the Bar by a Jury of Middlesex, for the killing and murdering of one John Bird 3. Martij, 6 Jac. Anglie & Scotie 42. The Indictment was taken at Hartford Assizes, before Wamsley and Croke Justices of Assize and Goal-delivery, for the killing of him in Theobals Park, Thomas Musgrave being present, and his Second, but fled, and stands Outlawed. Tavernier also was Outlawed, but returned, and was taken, and Termin. Hillar. 13. brought a Writ of Error, and reversed the Verdict, because there were but 14 days between the two County days, and pleaded to the Indictment, and now he was tried at the Bar for his life; one Hughes was Second unto Bird, who was also killed; a Brother of Bird did prosecute this business: And there being a good and sufficient Jury sworn, he produced his Witnesses to prove a former Quarrel, and a falling out between them; upon which, and upon a mutual Challenge the one to the other, they joyned in single Combate, in the which Bird was killed; and this they shewed, to prove a continuing malice, to make this Fact to be murder.

It was further shewed, that the cause of difference between them, and of the subsequent Challenge was first by Bird, who sent the Challenge unto Tavernier, who did accept of it upon very forcible provocations, and then sent him a Letter, appointing therein the time when, and the place where they were to meet, and the Weapon to be single Sword, and withall sent him a patern thereof, and to have a Second; accordingly they met on Sunday in the Afternoon, and there did fight; the greatest part of the Witnesses produced, did shew unto the Jury that all the provocation was on the part of Bird, who sent the Challenge, and that Tavernier would have had a Reconcilement made between them, being very unwilling to fight upon such a slight, or rather no cause at all, being only for his refusal to pay money unto Bird, which was owing by him to him, he being then minus sufficiens to pay this, but promised to pay him afterwards so soon as he could what was due to him; this would not satisfy Bird, but he would be revenged on him by single Combate.

The Judges perceiving the Circumstances, the which if they only were to be considered without the Law, would make the matter much favourable on the part of Tavernier, therefore in this Case they directed the Jury as to the matter in Law, touching the Murder.

Coke Chief Justice. It is well said by one, Infelix pugna, ubi plus periculum victori quam victo, (S.) (Loss of his Goods, of his Land, of his Life, and the jeopardy of Soul, without true Repentance.) This I say for Law, that if one only do give the cause and provocation, and sends the Challenge, and the other accepts of it, and upon this they enter Combate, and he which sends the Challenge is killed, this is clearly Murder in the other; for it is not material in the Law who begins the Quarrel, (so as there was a former Quarrel) and the malice still continuing until the last stroke given; for the difference will be this, if they are once reconciled for the first matter, and afterwards they happen to fall out again suddenly, and do fight, and the one kills the other, this is but a Manslaughter.

Croke Justice agreed with him herein, and no palliating of the matter, at the place by them appointed to fight, will make any difference or alteration of the Case.

Dodderidge Justice. The place was here appointed by Tavernier himself, he did fight upon the Sunday, having heard a Sermon in the morning, and the Text was, Non occides, so that it is altogether forbidden by God, because that juxta

imaginem Dei, factus est homo, No lawful cause can there be for one to fight in single Combate, but only in defence of his Country or State: He agreed in all with the other.

Coke. This is a plain Case, and without any question, if one kill another in fight, upon the provocation of him which is killed, this is Murder; here Taverner sends his Weapon, appoints the place and time, for no private provocation he ought to fight in such a manner, for it shall be Murder in him if he kills him in the defence of his Reputation. And we do all of us agree in this, that it is clearly Murder in him, notwithstanding he kills him upon the provocation of the other, and not on his part; where time and place is appointed, they sleep upon it, and so they fight, and he kills the other, we do all agree that this is Murder in him.

Haughton Justice. Two matters are here considerable: 1. Whether here be any excuse and extenuation of the Murder, the provocation being only by him that was killed: wherein I shall deliver my opinion, and herein I agree to that which hath been before delivered, that when there is a mutual consent to go to a place, and there to perform the fight, where they come not for their defence, but for to fight; each of them carries a Weapon along with him, the one of them is killed, this is clearly Murder in the other: So I agree herein, the Law to be as it hath been said.

The second matter, Whether here be any clearing of this, here a day is appointed, and a place, and two days after they do meet, according to their appointment, this is in discharge of the malice. Taverner then said, that he did confess his error, that he did not acquaint the Judges with this matter at the first, to have had an Order by them taken therein; and he being so forcibly urged to this by threats, to proclaim him a Coward, and that he would kill him in some base manner, this error in defence of himself and of his Reputation, had caused him to fall into this inconvenience: And he said also, That the Kings Edict was not then extant, and that therefore he did very much bewail his miserable and unfortunate chance, to be the first president in this Case, to have the Trial of Law.

To whom the Court answered, You are not the first president by many hundreds, for this was the Common Law before the Kings Edict, which was but Declaratio juris antiqui & non Introductio novæ legis.

And so with this direction of the Court, the Jury found the Prisoner guilty of Felony and Murder, of which he was Indicted and Arraigned, but that he had neither Goods nor Chattels.

Upon demand of the Prisoner, by the Clerk of the Crown, what he had to say for himself, why the Court should not proceed to give Judgment upon him.

The Prisoner said, That he had nothing further to say upon this.

Croke Justice. To the Prisoner, you have been Indicted for this Fact, and have pleaded Not guilty, and have had a fair Trial: The Jury have found you guilty, wherein they have done very discretely, and with good advice and judgment, they have well weighed and pursued their Evidence: And now Taverner take into thy heart with serious Meditation, all the Errors of thy life past, Turpe enim est, bene natis, & bene educatis, male vivere, as you have been: Now you are to prepare your self for your appearance at the Judgment-seat of God; neither good nor ill comes to any one by chance, but by the Divine Providence of God, as touching this offence of which you are found guilty, it is an offence of Blood, a crying Sin: For offences in other matters, Gen. 3. ver. 13. Dixit Deus ad hominem, Quare hoc fecisti? But in matters of Blood, Gen. 4. ver. 10. The question there is not, Quare hoc fecisti? sed dixit Deus ad Cain. Quid fecisti? vox Sanguinis Fratris tui clamat ad me de terra. No answer to this could be made, no excuse, (in defence of his Reputation) as here hath been made, but this is no excuse, this matter is prosecuted, and so now to be punished, ut poena ad paucos, metus ad omnes perveniat, for this offence of effusion of Blood, no slaves



less excuse can serve; Cain answered to Gods question of ubi est Abel, Frater tuus? with a Nescio, Nunquid custos Fratris mei sum ego? Homo homini Deus, non lupus, None of these will serve his turn, but O quid fecisti! Infelix victoria, where more damage comes to him which doth overcome, than unto him who is vanquished; his punishment is secret, inter pontem & fontem, he may find mercy: But as to the Murderer, Quid fecisti for him? vox Sanguinis Fratris tui clamat ad me, &c. maledictus eris super terram & profugus eris, super terram, The civil Sword of Justice hangs now shaking over your head, Judicia Dei sepe sera semper certa, as one well observeth, Blood it is a crying Sin, the which doth pollute the Land.

The Observation of the Barbarians, out of the light of nature, was admirable, where seeing a man to escape one danger, and to have another overtake him, as St. Paul, Acts 28. having escaped the danger of the Sea, upon the Land a Wiper fastened on his hand; they censured him presently, saying, He had provoked God, that he was a Murderer, whom though he had escaped the Sea, yet vengeance suffereth not to live; this they collected out of the Light of Nature, (but there they were mistaken in the person, but not in the matter): Here make your Repentance correspondent to your offence, Quid verba audiam cum facta videam? a Quarrel offered, and the same entertained, (on the Sabbath-day) you heard before a Sermon in the Pulpit, and the Text, Non occides; notwithstanding this, you did undertake this Quarrel, this doth much aggravate your offence, that you have not sucked so good succour out of so good Words, as you ought to have done: But if you will now cry unto God truly in sincerity of heart, Domine libera me de Sanguinibus, he will then hear thee, and he hath sent his Son to this purpose, for to deliver thee, who hath said, Come unto me all that be weary and heavy laden, &c.

The Jury here have done discretely and wisely, you are now justly condemned, inasmuch as the Jury have found you guilty; the Court doth therefore adjudge, that you shall be carried from hence to the place from whence you came, and from thence to the place of Execution, and there to be hanged per collum until thou art dead, & diu à mercy de vostre aïme. Judgment.

Coke Chief Justice. If the Cause be never so important, yet it cannot allow one to draw blood of a Subject; if this were lawful, who should then live? If all be so as you Taverner have said, yet by the very letter of the Law, this fact is Murderer in you: Here a Challenge sent, accepted of by you, the Weapon, time and place agreed on, and Seconds to be, and Chyrurgions to be ready; if this be not Murderer, what then shall be Murderer? misera servitus, ubi jus est incognitum, you are punished here, ut poena ad paucos. Nemo prudens punit, ut præterita revocentur, sed ut futura præveniantur; maledicta est terra propter effusionem sanguinis, nec aliter pacificatur ira Dei, nec placatur, nisi per effusionem ipsius sanguinis.

Nota, In the Case of Taverner, the Coroner gave evidence to the Jury, super visum corporis; but they would give up no Verdict, wherefore he adjourned them from time to time, and from place to place, but they would not agree upon a Verdict; upon this a Letter was sent to him from Flemming Chief Justice, not to take a Verdict of them; upon which he went to the Assizes at Hartford, and did acquaint the Judges with it; for his discharge the Juroys were fined, and the Indictment there taken at Hartford.

Coke. The Jury are to be Fined, if they will not give up their Verdict.

Dodderidge. If such packing be, the Indictment then is to be found before the Justices of Assize, as here it was: The Court commended the Coroner for his care in this business.

## Grange Plaintiff against Denny Defendant.

Entred Mich. 13 Jac. B. R. Rot. 165.

Error in a  
Quare Impedit.  
1 Ro. Rep. 363.  
1 Ro. Abr. 772.  
784.

Errors.

**I**n a Writ of Error to reverse a Judgment given in the Court of C. B. In a Quare Impedit brought there against the Archbishop, the Bishop, and three others Defendants. The Archbishop pleads, that he claims nothing but as Metropolitan; the Bishop pleads, that he claims nothing but as Ordinary, and the three others, as disturbers, make their Title; Judgment for the Plaintiff, three Errors here assigned for reversing of the Judgment (S.)

1. In the Quare Impedit here, Costs were assessed by the Jury; this Error was waived, being an Error only in the Jury, but no Judgment given for Costs, and the penalty of Damages include Costs. Another matter moved for Error, because there is no release of the party, of the Costs given by the Jury. The whole Court clear of Opinion, That this ought not to be, being not at all material.

20 E. 4. fol. 1.

2. The second Error insisted upon, That the Judgment given for the Plaintiff against the two first, (S.) the Archbishop and the Bishop, being without a Cessat executio, until the other be tried against the other three Defendants, this being one entire Quare Impedit, and for this omission, being an essential and principal part of the Judgment, therefore all to abate and to be reversed for the whole. And for this was cited 20 E. 4. fol. 1. A Quare Impedit brought by the Queen against divers, a recovery by default against one of them. The Judgment was to have a Writ to the Bishop, and Damages for half a year, but Execution to stay till it be tried between the other Defendants; otherwise this Execution against one alone would abate the Writ against the other Defendants; as in trespass against two, the Issue is tried against one, the Plaintiff prays Execution, the Writ shall abate against the other.

Coke Chief Justice. If he had taken Execution against the other, it is true then, and shall be so as it hath been said.

24 E. 3. f. 61.

36 H. 6. f. 13.

To prove that such a Cesser of Execution is material, and part of the Record, these Books were urged, (S.) 24 E. 3. fol. 61. Tower recovered with a Cessat executio, during the minority of an Infant, and 36 H. 6. fol. 13. in a Forger of Faux saits. So that (as it was urged) this is a material part of the Record, this being omitted in the Judgment in the C. B. being a material part of the Judgment, shall make the same to be erroneous; and the entering of this at the Assizes will nothing at all aid it.

Difference.

Coke 6 pars.  
f. 48. b. In Bos-  
wells Case.

3. The third Error, the Plaintiff here hath Judgment, & Breve Metropolitan granted to him, where it ought to have been Breve Episcopo. It was urged, the difference to be where the Archbishop and Bishop be Defendants, and claim nothing but as Ordinary; there it ought to be Breve Episcopo; but if the Bishop si Episcopus est pars, there it shall be Breve Metropolitan, Authorities and Precedents urged for this, Coke 6 pars. fol. 48. 6. In Boswells Case, In a Quare Impedit against the Bishop of London, and John Lancaster; the Bishop pleads, Quod ipse nihil habet, nec habere clamat in Ecclesia predicta, nisi admissionem, institutionem, & inductionem personarum, upon this Plea, the Plaintiff had a Writ to the Bishop, sed cessat executio quousque le Plea between the Plaintiff and the other be determined; and with this agrees 26 E. 3. fol. 75. Fitz. Nat. Brev. fol. 38. B. A man recovers his Presentation in the C. B. against the Bishop, he may have a Writ to the same Bishop, to admit his Clerk, or to the Metropolitan, if he will,

26 E. 3. f. 751.  
&c.

will, and Coke 5. pars, fol. 36. b. in Baynham's Case, Wray Chief Justice cited a Case adjudged in B. R. between Goodwin and Franklin, where a Venire facias was awarded to the Coroners, where it ought to have been to the Sheriff, and so Jurors returned by one who had no authority, that this was in the nature of an insufficient trial, and that therefore upon consideration had of 22 Eliz. Dyer, fol. 367. and of the Statutes they resolved, that this was not remedied by any of the Statutes, and therefore a Venire facias de novo was awarded. So here, as it was urged in this Case, the Writ being awarded Metropolitanano, where it ought to have been Episcopo, and the party put out of possession by this misawarding of the Writ; therefore this is erroneous. Coke 5. pars, fol. 58. b. in Specots Case, there Breve Johan. Archep. Cantuar. totius Angl. Primat. Loci illius Metropolitanano eo quod prædictus Episcopus est pars, & Episcopus in misericordia. It was urged, that this misawarding of the Writ here, is error in Boswells Case, Coke 6 pars, fol. 52. a. that the Metropolitan shall never present by laps, but when the inferior Ordinary might have collation by laps, and surceased his time, and so is 11 H. 4. fol. 8. and Fitz. Nat. Brev. fol. 48. C. So that it was urged, the difference to be where the Ordinary is a disturber, and where not; if he be a disturber, then it is in the election of the party, to have the Writ to him, or to the Metropolitan; but where the Ordinary doth no wrong, there the Writ ought to go to the Ordinary, without any such election in the party.

2. To maintain the Judgment; It was urged, the second Error to be no Error, (S.) the omission (quod cessat executio quousq;) because there was a respite of the Execution, until the Judgment given against all; therefore it was urged this omission to be no Error, these being only words of form, and not of substance, the same being only as a Caveat to the Court, that no Execution to be granted until, &c. it is but a respite of Execution, but no part of the Judgment.

3. As to the third Error, the Writ being to the Metropolitan, where it ought to be to the Bishop; this is no Error, it being here in the election of him who recovers, to which of them he will have his Writ. And if he be a disturber, or not, all is one.

The whole Court agreed in this, and made answer, That all the Books are so, that he may have his Writ to the one, or to the other, at his Election, where the Ordinary is a disturber.

It was then urged, that in this Case the party who recovered, hath election to have his Writ to the one or to the other, as appears by Fitz. Nat. Brev. fol. 38. B. It is in his election to have his Writ to the Bishop or to the Archbishop, and that without any distinction there put, 7 H. 4. fol. 37. the Bishop party to the Writ, ideo breve Metropolitanano: and in his default, sede vacante, then to the Guardian of the Spiritualities, as 19 Eliz. Dyer, fol. 354. Blowers Case, and 38 E. 3. fol. 12. the Writ awarded Metropolitanano, quia Episcopus Hereford fuit pars. Ut Blowers Case.

8 H. 4. fol. 22. The same Error there assigned, that the Writ was directed Metropolitanano, whereas it ought to have been Episcopo, he not being a disturber; there it was questioned, and Norton there assigned the same Error, as here in this Case; and yet the same there held to be good. And according to this, the Presidents were urged to be so. As the old Book Of Entries, fol. 278. & 478. where the Bishop claims nothing but as Ordinary, and yet the Writ there awarded Metropolitanano. Also in the new Book Of Entries, fol. 498. 501. 507. 509. & 598.

Coke Chief Justice. When the Bishop here had angered him, by accepting the Clerk of another, it is a plain Case, quia pars, he may well distrust him, and so have his Writ Metropolitanano if he will. But I have always observed this, if he be party to the suit or not, it is in the election of the party to have his Writ to the Bishop, or to the Metropolitan. But I will now move another matter, not touched before; allow this Writ to be Episcopo (which seems unto me prima facie,

22 Eliz. Dyer,  
fol. 367.

Coke 5 pars,  
f. 58. b. &c.

11 H. 4. f. 8.  
&c.

Fitz. Nat. Brev.  
f. 38. b.

19 Eliz. Dyer,  
f. 354. &c.

8 H. 4. f. 22.

Presidents.

Old Book Of  
Entries, f. 278.  
&c.



to be very hard.) There is Error in redditione judicij, and Error in executione. If you will have a Writ awarded to the Metropolitan, or to the Bishop, this is but only in point of execution; and therefore you ought to have had your Writ of Error as to this only (being but an Error in Execution, if any at all,) by this the Judgment shall not at all be shaken or reversed, (if at all, only quoad;) the Presidents in this Case will lead and direct us.

Haughton Justice. Whether may the Judges of Assise give Judgment there in a Quare Impedit?

Coke & Curia. They may so do in a Quare Impedit, and in an Assise.

Dodderidge Justice. This Rule is to be observed, (S.) That you shall not take away the Jurisdiction of any man without good and just cause, as here of the Bishop who claims nothing but as Ordinary, and no amerciament shall be here against him; for what cause therefore will you here take away from his Jurisdiction, and gives this to another? If the Bishop be a disturber, yet as to the execution of the Writ to him directed, the Law will trust him, if you which are the party will leave this unto him, but because in this Case he may delay you, it is therefore in your election either to have the Writ to him, or to the Metropolitan. And this is so where the Ordinary is a disturber; and this appears to be so by all our Books. But here the Archbishop also est pars, both of them being now in an equal degree, whether here in this Case you may take away the Jurisdiction of the Bishop; and there will be a difference between this Case, and the Case of the Sheriff and Coroners, the return by the Sheriff, where it ought to be by the Coroners, is not good. For they are of so great Antiquity, that their commencement is not known, otherwise it is of a Bishop, &c. But the reason which may be made here for the allowance of this Writ to the Archbishop is this, for that he hath primam Jurisdictionem, and the Bishop hath a Jurisdiction under him, and the same drawn out of his Jurisdiction. In all the Presidents before remembred, the Archbishop is not party.

Coke & Haughton. This shall make no difference at all as to the parties election, to which of them he will have his Writ directed, he hath his election in both Cases.

coke, 5 pars,  
f. 30. &c.

Coke. In Vere and Jefferies Case, put 5 pars, fol. 30. in Princes Case, I did first move this matter, where one had goods only in one Diocess, and the Metropolitan of the same Province, pretending that he had bona notabilia, in divers Diocesses commits the Administration, this is not void, but voidable by sentence, because he hath Jurisdiction throughout the whole Diocess; within his Province he hath the first Cathedral Church, and is the Ordinary, and all other Bishops within his Province are derived from him; otherwise it is, where the Ordinary of a Diocess doth commit the administration of goods, when as the party hath bona notabilia in divers Diocesses, this is void for all; this reason doth induce me in this Case to be of opinion, that this Writ here Metropolitanano is well awarded.

Dodderidge. Autline the Monk was the first Convert, and the first Archbishop of Canterbury; and he constituted one Paulinus the first Bishop of Rochester.

8 H. 4. f. 22.  
&c.

Richardson Serjeant. For the maintenance of this Writ here to the Archbishop, cited 8 H. 4. fol. 22. 3 Eliz. Dyer, fol. 194. Old Book Of Entries, fol. 525. placito 50. quia pars & nominatur in breve.

The whole Court agreed, If the Bishop be a disturber, that yet the party hath his election, to whom he will have his Writ.

Coke. Where the Bishop admits another man to my Benefice, this will trouble and anger me; and in a Quare Impedit against him and the other, he pleads, that he hath nothing but as Ordinary, I shall yet have my election, to have my Writ to him, or to the Metropolitan, or sede vacante, to the Guardian of the Spiritualities. And as touching the Guardian of the Spiritualities of common right, by the Common Law, the Dean and Chapter sede vacante of the Bishop, is Guardian of the Spiritus

Spiritualties, as appeareth by Term. Pasch. 17 E. 3. fol. 23. but now the Archbishops have used to have this by way of composition, as great Lords will inroach all into their own hands.

Dodderidge. Every Archbishop hath a Diocess and a Province, and of his Diocess he is a Bishop, and of his Province he is Archbishop, and within his Province he is to be Visitor of all the Churches within his Province, and sede vacante, of any Bishop within his Province, he himself is Guardian of the Spiritualties, of all the Bishopricks within his Province, sed sede vacante of his own Diocess, the Dean and Chapter of this is Guardian of the Spiritualties.

Coke. This did commence by way of Composition, but Originally it was not so, but the Dean and Chapter was Guardian of the Spiritualties.

Dodderidge. It doth not appear to be so by our Books, no mention being made of any such composition, but the Guardian of the Spiritualties to be according to the difference before put between a Province and a Diocess.

The whole Court clear of Opinion, That the Writ here directed Metropolitanò, is well awarded, and so this no Error; but yet it rested for this time upon a Curia advisare vult.

Afterwards (S.) Termin. Trinit. 14 Jac. B. R. this Case was moved again, and argued. And the former Errors insisted upon; 1. Because the Judgment was withheld any cesser of execution, until the other matters tried.

Coke. This is no Error; for that Execution was never sued out.

The chief and main Error insisted upon, was the awarding of the Writ Metropolitanò, whereas it ought to have been Episcopò, as it was urged by George Croke, if both of them had been disturbers, then he had his election to have his Writ to the one of them, or to the other. If in this Case, as it was urged, the Bishop had been condemned upon a Nihil dicit, the Writ then might have been to the Archbishop, by Fitz. Nat. Brev. fol. 38. the only Book insisted upon, being (if the Bishop be party, the Plaintiff there hath his election to have his Writ either to the Bishop, or to the Archbishop,) but as it was urged, this is to be intended where the Bishop is a disturber, and not where he is only pars nominata, and so is the Book of 5 H. 7. fol. 22. where he claims only as Ordinary, the Writ shall be directed to him, unless there be a special disturbance shewed; with this agrees 33 H. 6. fol. 14. Bohuns Case, and 21 E. 3. fol. 30, 31. where the Rule is given, That if no disturbance be found in the Bishop, the Writ shall be directed to him, but if any disturbance be found in him, then the Writ to be at his election, to him, or to the Archbishop; and so is 20 E. 3. Fitz. title Proces placito 42. that the Writ shall not be taken away from the Bishop, but where there is a wrong assigned in his person as Ordinary, by reason of his Office; for that admission and institution belongs unto him; and as it was urged, the president in the old Book Of Entries, fol. 427. is mistaken.

On the other side, 38 E. 3. fol. 12. was cited, where by Thorp, as this principal Case is, the party hath his election, to have his Writ either to the Bishop, or to the Archbishop.

Coke Chief Justice. The Writ is here awarded to the Archbishop, because the Bishop is named in the Writ of Quare Impedit, and also it appears by the Record, that he had admitted the Clerk of the other, and this before the Writ brought.

Denny brought the Quare Impedit against them all, and joyned therein the Archbishop also. If the Archbishop had not been named in the Writ, yet I think it had been very clear, that the Writ might have been awarded to the Archbishop, quia Episcopus est pars, and named in the Writ. And I also think, that the naming of the Archbishop in this Case shall make no alteration at all of the Case. But the reason of this is not as it hath been said, because of his supream Power and Authority, for if none of them were named, he ought to have the Writ to the Archbishop, he being the Diocesan, and not unto the Bishop, and this is clear. But the Reason is, quia pars & nominatur in Breve; It is to be considered, whether

Term. Pasch.  
17 E. 3. f. 23.

Termin. Trin.  
14 Jac. B. R.  
This matter  
moved again.

Fitz. Nat. Er.  
f. 38.

5 H. 7. fol. 22.  
33 H. 6. f. 14.  
Bohuns Case,  
21 E. 3. f. 30,  
31.  
20 E. 3. Fitz.  
&c.

38 E. 3. fol. 22.  
by Thorp.

here the joyning of the Archbishop doth make any alteration in the Case, Non quia Episcopus impeditur ideo breve Metropolitanano, sed quia est pars, & nominatur in breve. If this be Error, yet the same is only Error in redditione executionis, and it shall be very dangerous to reverse this Judgment for this Cause. And here also the Bishop is not an indifferent person, to whom the Writ ought to be directed.

And so without any further debate, this Case was adjourned till a further day.

At which time Richardson Serjeant moved the Court for affirmance of the Judgment.

Coke. The Law in this Case is very clear. If the Metropolitan is no party, and the Ordinary is a party, he may have his Writ Metropolitanano; and the joyning of them both in the Quare Impedit shall not at all hurt the matter, so that I am of opinion, that the party here in this Case may well have his Writ to the one of them, or to the other, as he pleaseth, and so his Writ here awarded Metropolitanano is well awarded.

Haughton Justice. I have seen some Presidents in which the Writ hath been awarded to the Metropolitan, quia Episcopus est pars.

The whole Court, nullo contradicente, agreed clearly, That in this Case the Writ being awarded Metropolitanano, is well awarded, and that the Judgment is no ways erroneous for this, and accordingly the Judgment of the Court was, Quod judicium affirmetur.

Judgment affirmed *per curiam*.

### The KING against Rivett.

Indictment upon the Stat. of 23 Eliz. c. 10.

**B**y Indictment upon the Statute of 23 Eliz. cap. 10. for taking of Partridges, Exceptions taken to the Indictment, the taking being therein laid to be cum retijs &c. & alijs, whereas there is no such words, as (cum retijs) and so the Indictment not good.

The whole Court clear of Opinion, That the Indictment was bad for this Cause.

Another matter was then moved upon this Statute, Whether such an Indictment may be taken before the Justices of Peace, or not? The Statute being that Justices of Assize in their Circuits, and Justices of the Peace in every Shire, County, and Town-Corporate within this Realm, in their Sessions, Hall and may, by virtue, &c. hear, enquire, and determine of all, &c. To this it was said, Shall be examined before two Justices of the Peace, this to be by examination of Witnesses, but if the same be at the Assizes, then the same to be according to the Law by way of Indictment.

Dodderidge Justice. By this construction, both parts of the Statute do well stand together, if at the Sessions, then to pursue the course of proceedings there by Indictment, and so the Law is to be taken. But if to be examined before Justices of the Peace, this then to be taken by examination of Witnesses. Here the Indictment being cum retijs, the same is not good, and so by the Rule of the Court, for this exception the Indictment was quashed.

Indictment quashed.



*Bennet Plaintiff against Belfield Defendant.*

**I**n an Action of Debt upon a Bond taken of the Defendant, being an Appren- Debt on a Bond.  
tice for to deliver up a just and true account of all such Wares to him delivered to Merchandize withall.

The Defendant demurs in Law upon this Declaration, and for cause sets forth the Statute of 5 Eliz. cap. 4. That all Indentures, Covenants, Promises and Bargains, of or for the having, taking, or keeping of any Apprentice, &c. shall be void, and that this Bond here was so taken of the Defendant, being an Apprentice, and so void by this Statute.

It was urged, that this Bond is out of the Statute, the same being for him to yield a good and just account for all Wares to him delivered, the which to do, every one is bound, as Merchants, for Wares to them delivered, and as a Bailly, to make a good account, this Case is not within the intendment of the Statute of 5 Eliz. Here are two several Wads (S.) the Indenture for Service, which is void by the Statute of 5 Eliz. but not this Obligation by him entered into for this collateral matter, the same being for the yielding of a just Account; the intent of the Statute was to make Bonds taken for Service, to be void and of no force by this Statute, but not other Bonds.

The whole Court agreed clearly in this, that all such Contracts are out of this Statute; this Statute being to make Contracts void for the having of an Apprentice, but this Bond here is clearly out of the Statute, being for the making of a just Account.

It is a desperate way to demur in such a Case, but he ought to have pleaded, that he had made a just Account, and thereupon to have come to a fair Trial.

Haughton. Justice. This Bond here is entered into for the performance of a collateral thing, and of such a thing as of common right ought to be done, and therefore the same is out of this Statute.

Dodderidge Justice. This Bond is not for the retaining, nor for the having of him as an Apprentice. Here the Contract to make him his Apprentice is void by this Statute; but as to the Wares to him delivered, the Bond here is taken of him to render a just account of these; this is a good Bond, and out of this Statute here, the retaining is void by this Statute, but this Bond taken to deliver a just account for the Wares to him delivered is a good Bond, and clearly out of this Statute, both out of the words, and also out of the intent of the same.

And so the Court all agreeing in this, by the Rule of the Court, Judgment was given, and so entered for the Plaintiff, with a Day of Execution till the next Term. Judgment for the Plaintiff.

*Fowkes Plaintiff against Childe Defendant.*

**I**n an Ejectione firmæ, by Robert Fowkes against William Childe, upon Non Ejectione firmæ. moved in Arrest of Judgment, that there was no good trial, the Pannel was right but the Distringas was not so, the same being between Robert Fowkes and John Childe, so that in this was the mistake, a contrary Distringas being by the Sheriff  
Cro. Ja. 395.  
1 Ro. Rep. 374.

put to the right Pannel; the trial was by a right Pannel. It was moved, if he had put in the Pannel, and no Distringas, and a trial had, whether this trial had been good, or not? Here the Case was, that the Sheriff had two Writs, the one good, the other bad, and he returns the right Pannel; but the bad Writ, whether this be now amendable, or not?

Haughton Justice. We may here well amend Error in the Court, but not the Error of the Sheriff. If the Distringas be Album breve, it hath been adjudged, that this shall be aided by the Statute.

Stat. of 32 H.  
8. c. 3.

Clarke and  
Walkendens  
Case.

Dodderidge Justice. If there had been no Distringas returned, and upon this Pannel tried at the Writs, and no Distringas returned, this is good after a trial by the Statute of 32 H. 8. cap. 30. But here it is objected, that a Writ is returned, and therefore, &c. In the Case cited it is true, there was a Writ, but unserved, because not returned; but here the Writ is returned, and the same is between one of the parties and a mere stranger, and therefore this is as no Writ, and then this aided by the Statute, being after a Verdict; here the Venire facias is well, and rightly returned, but with an ill Writ. Clarke and Walkendens Case cited, where there was Album breve.

Haughton & Dodderidge. This was there agreed by the Court to be bad, (no amendment to be here in this Case) but if the trial be good, Judgment is not then to be stayed.

Dodderidge. The Trial here is good, and the false Writ is as no Writ; and so the same is aided by the Statute.

Haughton. This Trial here is not good, and therefore as touching this matter. Curia advisare vult.

This Case was afterwards moved again, the Court being full.

Coke Chief Justice. Upon the matter here, there is a Distringas in Judgment of Law, notwithstanding the Sheriff hath filed a wrong Writ, this is not material, and if it be so, that here is no Distringas, then after a Verdict, this is aided by the Statute.

It was then urged by G. Croke, that here are two Writs awarded, one for William Childe, the other for John Childe, if no Distringas be, or no Venire facias, this is aided by the Statute, but this Case is not so.

Coke. If there be a faulty Writ at any time, this is not aided by the Statute; if there be a good Venire facias well returned, though no Distringas, yet this shall be a good trial; but if it do not appear the party to be according to the Venire facias, the trial then not good, a faulty Original shall make the trial bad, No Writ there is here between the parties; as here the return is, this Writ returned is between the parties or not, if between them, then aided by the Statute, if not, yet it is safe. If one Process doth issue out for another, as a Capias for a Scire facias, if the Defendant appear, this is no Error, it is but a Discontinuance, there being a Discontinuance and a Discontinuance; also if the Cozoners name be not to this, yet it is good enough, for this is out of the Statute.

Dodderidge & Croke agreed with Coke, that the trial here was good, and no cause for that which hath been moved, to arrest Judgment after the Verdict.

Judgment for  
the Plaintiff  
per Curiam.  
Nota.

Haughton Justice differed in opinion, that the trial was not good.

And so the Rule of the Court was, Quod judicium intretur pro querente.

Now, That it was assigned for Error, that an Infant Executoz did appear by Attorney, whereas he ought to appear by his Guardian.

Haughton & Dodderidge Justices. He ought to sue by his Guardian, for though he be an Executoz, and so in autre droit; yet he is, and still remains an Infant, and by consequence he is to have the privilege of his Infancy, which is to sue by his Guardian during the time of his minority. For otherwise by Haughton Justice, it may be very greatly prejudicial to him, and he may be tried by conspiracy, if to appear by Attorney (and the usual course in such a Case is) as all the Clerks informed the Court, was for him to sue by his Guardian.

Denham

## Denham Plaintiff against Cumber Defendant.

**I**n a Writ of Error, to reverse a Judgment given after a Verdict in an Ejectione firmæ, the Case appeared to be this: In an Ejectione firmæ, upon Non culp. pleaded by Dauborn the Attorney for the Defendant; a Verdict was found for the Plaintiff, who had his Judgment, for the reversing whereof a Writ of Error brought; the Error assigned was, because that no Bail was put in for the Defendant: But the Court was informed, that the Attorney had a Warrant from the Defendant to put in Bail for him, that he retained him, and paid him his Fee for this, and that the Attorney did reckon this unto him in his Bill of expences, and therefore it was prayed in maintenance of the Judgment to have this Bail now to be entered, (the same being but common Bail) which was to have been entered, but not done by the Attorney.

A Writ of Error.  
1 Ro Rep. 372.  
1 Ro. Abr. 207.

It was moved for the Plaintiff in the Writ of Error, that as this Case now is, the Bail cannot be entered, because that the Attorney which was so retained by the Defendant is now dead, and therefore no entry of the Bail now to be; but if the Attorney were living, Bail might then now be entered.

Coke Chief Justice. When the Attorney is once retained; and hath taken his Fee to do this, and doth it not, it shall be very mischievous, if for such an Error the Judgment shall be reversed, and this ought to have been but common Bail; and therefore to prevent such a mischief, I do agree that this Bail shall be now entered, as of the same time in which the same should have been entered.

Dodderidge Justice. agreed with him herein to have the Bail now entered: If the Attorney were living, we would then compel him to do this.

Coke. Here is a ground to have this Bail entered and filed, and this to be now entered, as of the same time according to which he had given his money to have this entered, and here to have one to become Bail, great inconvenience will ensue.

Haughton Justice agreed herein, we have here ordered this before, if a Will remains in the hands of an Attorney, and not filed; after Execution taken out, to have this filed.

Coke. We ought here of right to make a rule for the Entry of the Bail, when as the Attorney was paid for it, and did not do it as he ought to have done.

Dodderidge. Hereafter we will have common Bails viewed at the end of every Term, and if any Attorney will not enter their Bails, we will then turn him out of the Office (divers other Writs of Error are here hanging for the same matter) all which by the Rule of the Court shall now have an end.

Coke. When an Attorney appears for the Defendant, this doth include, that he is to put in Bail for him, and for the future we will certainly view the Bails at the end of every term, and take that course herein as hath been observed.

Judgments are not to be reversed for such Errors, if they should, it would be very mischievous: In this principal Case, notwithstanding the Attorney who had taken his Fee for the entering of Bail be dead, and no Bail as yet entered.

By the Rule of the whole Court, Bail was now entered, as of the same time in which the same ought to have been entered.

Bail entered,  
&c.



*Biggs Plaintiff against J. S. Parson de D.  
Defendant.*

A Prohibition.  
Mo. 917. n.  
1305.  
1 Ro. Rep. 378.

Stat. of 50 E.  
3. cap. 4.

Prohibition  
denied.

**I**n a Prohibition, a Libel being against him in the Spiritual Court for Tythes, a suggestion there made by him for a modus of 2 s. for all Tythes; upon this a Prohibition granted; the parties at Issue upon this, went to Trial, and in this Trial, the Plaintiff in the Prohibition became non-suit, because he could not prove the modus; upon this a Consultation was granted to the Spiritual Court, for them to proceed there; afterwards a Sentence there passed against him, against the modus; from this Sentence he appeals to another Court, upon the same Libel there against him, he suggests a new modus of 2 s. for Tythe-Corn and Hay, and upon this prays to have a new Prohibition upon the Statute of 50 E. 3. cap. 4. and this upon his own surmise, there being the same Libel as before.

Coke Chief Justice. With them double Pleas are not disallowed: This Appeal here being in the same Cause, shall not make us to grant a new Prohibition; the Statute is, after a Consultation duly granted: If a Parson do libel there for Tythes of Trees above twenty years growth, if a Consultation be granted, and he libels there again for Tythe of great Timber-Trees, he shall here have a new Prohibition, because the Consultation was not duly granted; this Act of Parliament ought to have a reasonable Construction, (S.) to be before the same Judge, and for the same Cause.

Dodderidge Justice. The Appeal doth only suspend the Sentence, but yet the same stands still in force: In this Case it would be very mischievous, if a new Prohibition should be granted; for so upon several Appeals three or four Prohibitions might be granted, which would be very inconvenient; notwithstanding the person of the Judge be here altered, yet it is for the same cause as before.

Haughton Justice. The intent and purpose of this Statute was, that he which hath but one suit, should not be infinitely troubled.

The whole Court against the Prohibition, for the great inconvenience that might ensue, and so a Prohibition in this Case was denied.

*The Spanish AMBASSADOR for his Master Plaintiff,  
against Captain Gifford Defendant.*

The Bail  
brings in the  
Principal, &c.  
Mo. 850.  
1 Ro. Rep. 371.  
2 Ro. Abr. 491.

**T**he Plaintiff having a Judgment in an Action of Debt in the C. B. against the Defendant, and a Capias for the taking of him; because he could not be taken, a Scire facias was granted to him against the Bail, upon which a Nihil was returned; afterwards Gifford the Defendant brought a Writ of Error to reverse the Judgment, and by this the Record was removed in B. R. after a second Scire facias granted against the Bail, who before the return of this, in his discharge, brought in the principal, and prayed to have this here allowed; and whether this should be now allowed, or not, was the question?

Coke Chief Justice. In Sir George Bowes Case: It was resolved, That if the Bail do bring in the principal upon the first Scire facias, this de jure ought to be

be allowed; but if he will sleep, and do nothing herein till the second Scire facias, and then will bring in the principal, this is not then to be allowed of, as in that Case it was Resolved; and this was in the time of Queen Eliz. in this Court: And so as all the Clerks did now inform the Court, it is now so used, the Recognizance forfeited for doing nothing upon the first Scire facias.

Haughton Justice. The Judgment was in Debt, a Capias returned, the new Sheriff had not executed this; a Writ of Error brought to reverse the Judgment, after the Writ is executed, this Writ of Error shall not be a defeating of the Execution; the Scire facias is for him to shew why he doth not answer, he saith to this, here is the party for whom I am Bail, this is good upon the first Scire facias.

Coke. The Court of C. B. and this do differ in this manner, there in the C. B. they have but one Scire facias, but here we have two; the Record is here removed before the second Scire facias, and therefore he is not to bring in the principal, after this is removed by a Writ of Error, and so this is not now to be allowed; and this the Clerks did affirm to be the ancient use in this Court, to allow of this bringing in of the principal upon the first Scire facias, but not upon the second: But yet of later time they have here used the contrary (in the time of Popham Chief Justice) to allow of this bringing in of the principal by the Bail, before the return of the second Scire facias, (as in this principal Case it now was) but otherwise it was resolved in Bowes Case, the same to be allowed upon the first, but not upon the second Scire facias.

Dodderidge. State super vias antiquas, this is a sure and the best way, and therefore this is not to be allowed upon the second Scire facias.

And so by the Rule of the Court, this was disallowed, being upon the second Scire facias, according to the resolution in Bowes Case.

The bringing  
in of the prin-  
cipal by the  
Bail, &c.

### Langworthy Plaintiff against Scott Defendant.

**I**n a Writ of Error to reverse a Judgment, given in the Manor Court of Tiverton, Error.  
where they prescribed to hold Plea of any sum, if it be in any matter touching the Stannary. Nota, there were two Courts, (S.) The Manor Court of Tiverton, and the Fe Court: The Manor Court was in Cornwall, and the Fe Court in Comitatu Devon.

Langworthy brings his Writ of Error upon a Judgment given in the Manor Court, whereas in verity the principal Judgment was given in the Fe Court in Comitatu Devon, so that herein he hath mistaken himself.

Dodderidge Justice. Upon a Judgment given in the Stannary Court, the course is, 1. To appeal to the Vice-Warden. 2. From him to the Warden, and after to the Duke himself of Cornwall, when he hath had his Livery.

Coke Chief Justice agreed with him herein; but before this, that he hath his Liberty to appeal: 1. To the Warden, and afterwards to the Council: But no Writ of Error lieth upon a Judgment there given, for any matter touching the Stannaries; but upon a Judgment there given upon collateral matters, a Writ of Error well lieth, and this hath been so before resolved, as the same is to be seen recorded in the Chancery, in the Petty-Bag Office, by all the Judges, upon a Conference had.

The whole Court of Opinion, That this Writ of Error, as it is here brought, is not good.

Termin.

## Termin. Trin. 14 Jac. Banco Regis.

Cowper Plaintiff against Frankline Defendant.

Entred Termin. Trin. 13 Jac. B. R. Rot. 941.

Trespass and  
Ejectment.  
1 Ro. Rep. 332.  
384.  
Cro. Ja. 400.  
Mo. 848. n.  
1152.  
Godb. 269.  
1 In. 19. 6. the  
Limitation of  
the use is void  
2 Ro. Abr. 719.

**I**N an Action of Trespass and Ejectment, upon Non culp. pleaded, the parties were at Issue, and went to Trial; the Jury found a special Verdict, upon which Verdict the Case was briefly this, (S.) One John Walter being seised of Socrage Land in Fee-simple, conveys this Land by Deed of Feoffment, unto Thomas his Son in this manner, (S.) To him, and to the Heirs of his Body, Habendum to the use and behoof of him and his Heirs for ever; who afterwards deviseth all this by his Will to one, under whom the Plaintiff claims: The points moved in this Case were.

First, What Estate Thomas the Son had by this Feoffment limited in this manner, Whether he hath an Estate tail, or in Fee-simple.

The second question, Whether Tenant in tail may be seised to another use.

Term. Hill.  
13 Jac. B. R.  
&c.

Nota, That this Case was argued, and long debated by Counsel of both sides, Termin. Hillar. 13 Jac. B. R. with some Opinion of the Judges herein. And then,

Coke Chief Justice. Whether Tenant in tail may be seised to an express use? I have much staggered herein (but in this, Mr. Plowden was always confident that he could not) to an implied use, without all question he cannot stand seised: In this Case we are to judge, like Judges, upon the Fabrick of the Deed.

A Feoffment at the Common Law made to one, and to the Heirs of his Body, was a Fee-simple conditional; afterwards the limitation is, to the use of him and his Heirs; these are to be such Heirs as were named before.

As if a Feoffment be made to one, and to his Heirs, as long as J. S. shall have Heirs of his Body, to the use of him and his Heirs; no new Heirs by this is to have this Land, but the Heirs of his Body.

If a man be seised of Land, to him and to his Wife, and to the Heirs of him who levies a Fine without any consideration, this shall be to the use of such Heirs as the Estate before was; and so in this principal Case, upon the composition of this Deed, the meaning was, that he should have but an Estate tail, and no Fee-simple.

Dodderidge Justice. If Land be given to one, and to his Heirs, as long as J. S. shall have issue of his Body, the remainder over, this is a Fee-simple determinable, and the remainder is void.

Croke Justice. Here his meaning was to make a restraint, hæredibus prædictis.

Stat. of 32 H. 8.  
&c.

Dodderidge. Is not this here a Fee-simple within the Statute of 32 H. 8. cap. 1. Of Wills? clearly it is.

Coke agreed herein with him, for a determinable Fee-simple is devisable within that Statute: But if the same be limited to one and to his Heirs, during the life of another, this is not devisable within the Statute, and so is the difference.

And



and to this purpose, see 8 Eliz. Dyer, fol. 253. placito 99. & 100. *Cassandras Case*. 8 Eliz. Dyer, f. 253. &c.  
 We are here Judges of the Law. To this purpose is the Case of *Odiham* remembred 8 pars, fol. 118. b. in *Dodder Bonhams Case*, where Carter was Plaintiff against Ringstead, Hillar. 34 Eliz. C. B. Rot. 120. where A. was seised of the Manor of Staple in Odiham, in Comit. South. in fee, and also of other Lands in Odiham in fee, suffers a common recovery of all, and declares the use by Indenture, that the recoverer shall stand seised of all the Lands and Tenements in Odiham, to the use of A. and his Wife, and to the Heirs of his body begotten; he dies, and his Wife survives, and enters into the Manor, by force of the general words, adjudged that these shall not extend to the Manor, which was specially named here in this principal Case, it is to the use of him and his Heirs; these shall be the Heirs of his body. Coke 8 pars, f. 118. b. &c.

*Dodderidge*. Before the Statute of 27 H. 8. cap. 10. of Uses (S.) in 24 H. 8. *Stat. of 27 H. 8. c. 10. Of Uses.*  
*Brook*, title Feoffments to Uses, placito 40. it was held for clear Law, that Tenant in tail could not stand seised to the use of another. It is now to be considered, whether the Statute of 27 H. 8. cap. 10. hath made any alteration in this, or not?

*Coke*. The Statute of 27 H. 8. doth only execute old Uses, but doth not create any new Uses.

*Dodderidge*. The Case in 2 Eliz. Dyer, fol. 186. is good Law.

*Coke* agreed with him herein.

*Dodderidge*. By the Use, another Estate may be than what was before.

*Coke*. I have always thought, that Tenant in tail by express limitation cannot stand seised to the use of another.

*Dodderidge*. Without all question he cannot be seised to an implied use, but the question here will be, whether he may be seised to an express use. If Land is given to one and to his Heirs, and if he dies without Heirs of his Body, the remainder over, this is a good remainder by 35 Affisar, placito 14.

*Coke* at this time inclined to be against the Plaintiff.

Afterwards (S.) Termin. Pasch. 14 Jac. B. R. this Case was moved and argued again, with some opinion of the Judges further herein. Term. Pasch. 14 Jac. B. R. &c.

It was urged for the Plaintiff by *George Croke*, That quacunq; via data here is a good Estate tail; and if one brings an Ejectione firmæ for the whole, having title but unto a moiety, yet as it hath been here adjudged against *Bracebridges Case* in *Plowdens Commentaries*, he shall have Judgment for a moiety.

*Dodderidge*. In 24 H. 8. *Brook* before remembred, it was adjudged by all, that Tenant in tail cannot stand seised to the use of another.

*Croke*. By express limitation it may be to the use of another.

*Haughton Justice*. This is a great question, and very considerable.

*Croke*. The intention of the party is here to be regarded.

*Haughton*. It is agreed, that before the Statute of 27 H. 8. this was no good use.

*Dodderidge*. The Case in 24 H. 8. was before the Statute Of Uses. The reason then was, that if he did execute an Estate according to the use, the issue may reduce this back again by his Forfeiture. 24 H. 8. Brook.

*Haughton*. The Law will not suffer nor compel one to do a void thing.

*Dodderidge*. This Case is put in *Wallinghams Case*, in the Commentaries.

The whole Court then said to the Plaintiff, That his best way would be to have a Judgment for a moiety as a Coheir. The Court inclining to be of Opinion, that Tenant in tail cannot be seised to the use of another. And so for this time the Case was adjourned.

Afterwards (S.) in this Term of Trinit. 14 Jac. B. R. this Case was moved again. And the Judges briefly delivered their Opinions herein. Term. Trin. 14 Jac. B. R. &c.

*Coke*. The Estate here is an Estate tail, and this subsequent use thus limited,

doth not alter the Estate, and this is the Stronger, being made to the party himself; and I am very clear of this opinion, and this is stronger than if it had been to a stranger, this here is to the use of him, and the Heirs of his body. It is an ill office of an Interpreter to confound the intent of the party who made the Dæd. The Statute of donis conditionalibus, scilicet, finis ipso jure sit nullus.

I also am of opinion, that tenant in tail cannot be seised to a Use; he cannot execute any Use, no more than a Corporation, 24 H. 8. Brooks Cases before remembered, and 27 H. 8. fol. 10. in Dockwrayes Case to this purpose.

Croke agreed with him herein, and for the same reason, and that these last words in the Dæd are more by way of explanation than of limitation; and these words ought to be applied to the sense and meaning of the party, and do not enlarge the precedent Estate no more than a warranty shall do, and so of the use here.

And as for the second point, It is very clear, that Tenant in tail cannot be seised to the use of another.

Dodderidge agreed with him herein.

1. It is clear, that this Estate, as the same is limited by the Dæd, is an Estate tail.

24 H. 8. Brook.  
Plowdens Com.  
f. 555. &c.

And for the second Point, be it by way of limitation, before the Statute of 27 H. 8. or after the Statute, Tenant in tail cannot be seised to the use of another. Before the Statute (S.) 24 H. 8. Brook before remembered, being a Resolution of all the Judges, that he cannot be seised to the use of another.

24 H. 8. Brook  
Feoffments  
&c.

In the second part of Plowdens Commentaries, fol. 555. in Wallinghams Case, it is there said by Manwood, That if one be seised in fee, and at this day makes a gift in tail to one, to the use of another in fee, now by this the cesty que use, who hath the Land, by the Statute of 27 H. 8. hath one Fee-simple in the Land determinable, upon the Estate tail, and the Donor another. But Note there by Plowden, that this cannot be so by Law, for that a use cannot be limited upon an Estate tail. As it is adjudged in 24 H. 8. Brook Feoffment to uses, placito 40. and Brooks Cases, fol. 11. placito 60. And the true reason why before the Statute of 27 H. 8. Tenant in tail cannot stand seised to the use of another, is because he cannot be compelled to execute this, and if he do execute it, his Issue may fetch it back again by his Forfeiture. For as it is in the Statute of Westminster. 2. cap. 1. De donis conditionalibus, voluntas donatoris in charta sua manifeste expressa, de cetero observetur, and this is not to be altered. Here it is limited to be to the use of his Heirs; this ought to be such Heirs as before were expressed in the first part of the Dæd, and this to be so is a very plain case. And so this Land then is to descend and come unto the two Daughters as coheirs, and so the Plaintiff ought only to have Judgment for a moiety; as for that which belongs unto one of the Daughters under whom he claims.

The Stat. of  
Westm. 2. c. 1.  
De donis.

Haughton agreed herein in opinion with him, upon the Resolution in 24 H. 8. and no difference there will be, whether the same be before or after the Statute of 27 H. 8. Of Uses, the Case in 24 H. 8. overrules this Case; also this use here doth not alter the nature of this Estate, contrary to the first limitation.

Coke. I was always of this opinion, That Tenant in tail cannot execute a use, and that by the Statute of Westminster. 2. cap. 1. if a Fine be levied, finis ipso jure sit nullus.

Judgment for  
the Plaintiff  
for a moiety.

The Court all agreeing clearly herein. Judgment was entered for the Plaintiff, but only for a moiety, which belonged to one of the Daughters and coheirs, under whom the Plaintiff claimed the whole.

*Cotton Plaintiff against Wescott  
Defendant.*

**I**n an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict was given for the Plaintiff, George Croke moved the Court in Arrest of Judgment, that the Declaration is not good, there being no good consideration therein set forth to raise the promise, the same being for a consideration past, and so not good. The Case for this being, That the Defendant was a Suter to a young Maid, who did sojourn in his house, afterwards the Defendant did marry her. And did then desire the Plaintiff, that his Wife might still continue to sojourn with him for a year longer, to which the Plaintiff agreed; and that afterwards, (S.) such a day and month, &c. which was then about the middle of the year, the Defendant did promise, that in consideration that he would suffer his Wife to continue there as a sojourner for the whole year, that he would then pay him for the whole year, (as well as for that which was past, as for that which was to come.) And so it was urged, that this Assumpsit was grounded upon a consideration past, which is not good in Law, and so is 10 Eliz. Dyer, fol. 272. the Case of the bailment of the Servant.

Action upon  
the Case on  
a promise.  
1 Ro. Rep. 381.  
1 Ro. Abr. 12.

10 Eliz. Dyer,  
f. 272.

Coventry for the Plaintiff; If the Case had been so, that the whole year had been past; and then the Defendant had come to the Plaintiff and made this promise, that in consideration he would sojourn his Wife for a year longer, he would then pay him for this year, and for that which was past before; this had been a good consideration to raise a promise, for that he is at a prejudice by this, for per-adventure he would not have sojourned his Wife for this last year, if it had not been for the promise of payment of the first money.

Coke Chief Justice agreed this to be a good consideration to raise a promise.

Coventry. This doth not differ from the principal Case; for although the Plaintiff had agreed to sojourn the Defendants Wife for a year, yet there was no certain Sum agreed upon to be paid for the same, and therefore it was in his election to keep her till the end of the year, or not; and therefore if the Defendant had not made this promise in the middle of the year to pay him so much, he would not have sojourned his Wife until the end of the year.

Croke. I agree the Case in 10 Eliz. of the bailing of the Servant to be so, and I agree also, that if all the year had been past before the Assumpsit had been made, that this had not been good: But here, inasmuch as this was before the year was ended, this is a good promise, grounded upon a good consideration.

Dodderidge Justice agreed with him herein; and here the sojourning of the Wife was at his request in principio anni. If upon request, one becomes bail for J. S. in an Action against him; if afterwards, hanging the Action, he doth promise to discharge him of this; this is a good consideration to raise a promise, by reason of the request precedent.

Coke agreed with him herein, because the Action here was continuing.

It was then urged, that here is another consideration for another promise in the Declaration (S.) In consideration that the Plaintiff should board the Defendant for a quarter of a year to come, he did assume to pay him tantum, quantum meritis esset, and doth alledge, that he did board him for eleven weeks, and so of his own showing; it appears that he had not boarded him for the whole quarter.

Coke & Dodderidge. This is good enough, for if he would not come to board



to the Plaintiff after the eleven weeks, yet he shall pay him for the time that he had been with him.

It was then further urged, that the Plaintiff in his Declaration sets forth divers promises to pay, tantum, quantum meruit, for the doing of divers things, and hath set forth performance of them, and that he deserved so much for every one of them in particular, the which in toto, amounts to such a sum, which the Defendant, licet scipius requisitus, hath not paid, so that it appears that here are several promises, and but one demand made.

Coke. Yet this is good, for the words licet scipius requisitus; and contractus est quasi actus contra actum; and if one contracts to pay unto another for any thing, tantum, quantum meruit, as for a quarters board, if he will go away two or three days after, he shall pay for the residue.

Judgment for  
the Plaintiff  
per Curiam.

Nota, That in this it was agreed by Coke and Croke, that an Infant shall not be charged, upon his promise for the board of a stranger, but otherwise it shall be for his own board.

The whole Court agreed the Declaration to be good, and the promise grounded upon a good consideration, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

18 E. 1. Way-  
lands Case.  
1 Ro. Rep. 400.  
V Mo. 851.  
1 Io. 132.

Nota, Upon a motion made in Court, It was questioned, whether the Wife of a banished man should have her Joynture?

Coke Chief Justice. In 18 of King E. 1. there was a famous Case, and it was Waylands Case a Judge, and banished by Parliament. Then they held Pleas in Parliament. There were then three things offered unto Wayland.

1. Whether for the offence laid to his charge, he would be tried by Parliament? 2. second, to be perpetually imprisoned. 3. third, whether he would be banished?

He made his choice of Banishment; and so he was accordingly banished by Parliament; and his Wife then brought her Writ of Dower. It was held the same did not lie, but an Action by her brought for a personal wrong done to the Estate which he had conveyed to her, was held well to lie, but not Dower. It was then questioned, whether after the banishment of her Husband, she should then enjoy her Joynture settled on her for her life, or not? To the debating of this Case, all the Kings Council, and all the Judges were called. And it was then upon good advice and great deliberation Ruled, and Resolved by them all, That she should have her Joynture, and enjoy the same during her life, after the banishment of her Husband; which she enjoyed accordingly.

Presidents, &c.

And three other Presidents there are as touching this matter, (S.) one in the time of King R. 1. and two in the time of King H. 3. so that the Case of the Wife of Sir Robert Belknap, in the time of King H. 4. was not the first Case, though it was there said, Ecce modo mirum, quod foemina— that a Wife brought a Writ without her Husband, yet this was no great marvel, for she shall have an Action, and be accounted of as a feme sole, when her Husband is banished by Parliament, or absures, and no other kind of banishment there is of which our Law takes Consequence. Belknap was banished, and his Wife had her Dower.

10 E. 3.

Dodderidge Justice. This is not the first nor the second President, for in 10 E. 3. the Wife of one Matrauers brought a Writ of Dower, her Husband being in banishment, and held maintainable.

The

The KING against the Major and Burgesſes of the City  
of Gloceſter.

**A** Writ of Reſtitution being directed to the Mayor and Burgeſſes of the City of Gloceſter, for to reſtoze Taylour to the place of Alderman, he being by them removed from his ſaid place; upon this a return was made by them, wherein they expreſs ſeveral cauſes of his removal, exceptions taken to this return, and argued by Coventry for Taylour, That the return was not good, Termin. Paſch. 14 Jac. B. R. The cauſes therein ſpecified, for his removal being not ſufficient. The one cauſe being, for his lending of money unto young men by the hands of his Wife. This as it was urged was no cauſe at all, being but a collateral cauſe, and not trenching to things incident to his place as an Alderman, and for this he is to be puniſhed by other means, and not by removal, as it was here adjudged in Bags Caſe, Termin. Trin. 13 Jac. and Reported, Coke 11 pars. fol. 93. and the other cauſes ſpecified in the return are of the ſame nature; Alſo it is there expreſſed for a cauſe that he was a Drunkard. This is no cauſe to remove him. Alſo the return in this is inſufficient, expreſſing therein, that by their Letters Patents, of their Incorporation, it is ſpecified, That the Mayor and the Common Council may remove him; and that they ought to be 30 of the Common Council. But it doth not appear by their return, that any Common Council was held by them for this buſineſs; In the return it is ſpecified, that he called unto him 30 of the Common Council, & in domo conſilij, being aſſembled, they there for theſe cauſes did remove him. But it is not ſhewed by them in the return, that this was ſo done by them at a Common Council.

A Writ of  
Reſtitution,  
Gloceſter.  
1 Ro. Rep. 409.  
2 Ro. Abr. 455.

Term. Paſch.  
14 Jac. B. R.  
argued.

Trin. 13 Jac.  
B. R. &c.

Croke Juſtice. A common Drunkard, is an unfit perſon for Government.

Dodderidge Juſtice. Bags Caſe, which was here cited, was for indecent words ſpoken. But take heed of overt acts, as here in this Caſe. And ſo further time was given by the Court in this Caſe; for the reading of the Record, and for further argument of this.

Afterward, in this preſent Term of Trinity, 14 Jac. B. R. this Caſe was moved again, upon the inſufficiency of the return, and a Writ of Reſtitution prayed. It was now urged, that their Common Council ought to conſiſt of 30 Burgeſſes at leaſt. It is ſet forth in the return, that he was called before 32 of their Common Council, and becauſe he did not give ſufficient answers to the matters objected againſt him, they did therefore remove him. If he had cauſe to be reſtozed, and they did not reſtoze him, he may well have (as it was urged) his Action upon the Caſe at the Common Law; he having a Franchiſe in his Burgeſſhip, by the Law of the Land. Alſo this Charter may extend to one that is elected an Alderman, after the Charter, but not to him that was one before, and this is not ſhewed by them in their return to be ſo; that he was elected an Alderman after their Charter; their Charter alſo is, That the Mayor and the Common Council, this ought to be done by them, at a Common Council, but it is not ſo ſet forth to be. It was therefore prayed, upon the inſufficiency of the return, to have him to be reſtozed.

Term. Trin.  
14 Jac. B. R.  
&c.

Coke Chief Juſtice. The Charter is the Mayor and the Common Council, &c. This ought to have been done by them at a Common Council. And of this there ought to be given to him a lawful warning, for if they will aſſemble themſelves together in a cozner, or at an Alehouſe, there they cannot diſplace him: But this ought to be done by them in their Common Council-houſe, and alſo at a Common Council there held, otherwiſe the ſame not good.

If one be a Magistrate, being a common Drunkard, this is a personal offence, and a good cause to remove him, because this goes to the point of his Government, and therefore this is a good cause to remove him, for that such a person gives an ill example to others, and for this cause is an unfit person to Govern; otherwise it is if he be drunk by accident.

Dodderidge. In Gloucester they have a large and great Precinct, six miles, and the Aldermen there are Justices of the Peace within the City, and at the Assizes they have a place to sit by themselves.

Haughton Justice. Here the removing of Taylor was in the Council-house, but in the return, it is not said to be at a Common Council there held, as it ought.

The Court all agreed, the return not to be good, and so by the Rule of the Court, a Writ of Restitution was granted, to have him restored to his Burgeship.

Afterwards, Mountague the Kings Serjeant being not satisfied with this, moved the same again, and took exception to the Writ of Restitution, being directed to the Mayor and Burgesles, whereas the same ought to have been to the Mayor and Common Council, who removed him; the Writ to have him restored, ought to be directed to them who removed him, and to them the power is given by their Charter to remove, and not to the Mayor and Burgesles.

To this it was answered, That the Writ was well awarded; for whosoever hath power to remove, yet the Writ of Restitution ought to be directed to them who have power to elect and place, and these are the Mayor and Burgesles, and therefore the Writ being directed Majori & Burgesibus is good.

Coke. The Writ of Restitution ought always to be directed to them which have the Inheritance, and this is in the Mayor and Burgesles, and therefore the Writ here is well awarded, for the Mayor and Common-Council do make but a part of the Body, and so the Writ well awarded.

As to the other matter, clearly this removal ought to have been at a Common Council, and not as here it is in the return, for a return ought to be as certain as a pleading.

Wagganors Case, Coke 8 pars, fol. 122. was then objected, to prove that such precise certainty is not requisite to be in a return.

Coke & Curia. Yet there ought always to be a convenient certainty in a return.

Haughton. It is said, that this removal was in domo consilij, but not apud commune consilium, as the same ought to have been, and so not good. As if one should say, Judicium redditum in Aula Westmonasterij, this is not good, but he ought to say in what Court, and before what Judges; this is the chief matter, and therefore the certainty of this ought to have been alledged in the return.

Coke agreed with him herein, and therefore by the award of the Court he ought to be restored to his place.

Mountague then moved the Court, Whether notwithstanding this Writ of Restitution, they may not proceed there again against him at a Common-Council.

Coke. This they may well do, if they have good cause, but yet with this observation, That they are to do that which is justum and iuste; justum for the matter, and iuste for the manner: And clearly if a Magistrate, an Alderman be Ebrius, common, and not by accident, he is an unfit person for Government, and this is a good cause to remove him.

A Writ of Restitution, &c.

The whole Court agreed herein: By the Rule of the Court, a Writ of Restitution was awarded for the restoring of Taylor to his place of Alderman, because that by the return, it appears that he was removed from his place, in domo consilij, but not apud commune consilium.



*Austin Plaintiff against Monk Defendant.*

Entred Termin. Pasch. 14 Jac. B. R. Rot. 544.

**I**N a Scire facias upon a Recognizance, the Case was this: Austin recovered in Debt in this Court against one Down, who brought a Writ of Error to reverse this Judgment in Camera Scaccarii, which was returnable 3. Februarij last, and did find Bail, according to the Statute of 3 Jac. cap. 8. the Defendant Monk being his Bail, and bound in a Recognizance, that Down should prosecute his Writ of Error with effect, and to satisfy the Debt and Damages, if the Judgment was affirmed, and that 12. Februarij the Scire facias was brought against him upon the Recognizance, to know why he should not have his Execution, in regard that Down did not prosecute his Writ of Error.

*A Scire facias.*  
Mo. 853.  
Poph. 186.  
1 Ro. Rep. 392.  
Cro. James  
402.

The Defendant to this pleads, that whereas the Writ of Error was returnable 3. Februarij, Down the principal 2. Februarij, venit hic in Curia, & reddidit se in eadem Curia, in discharge of his Bail, & per mandatum Curie committitur Marishallo, & adhuc remanet, in the Prison of the Marshally in the Execution; upon which Plea the Plaintiff demurred in Law.

It was urged by Davenport for the Plaintiff, that this rendering by the principal of his Body, in this Case shall not discharge the Bail, because he is bound to satisfy the Debt and Damages.

And the intent of the Statute of 3 Jac. was to give a certain remedy against the Bail, and here the Recognizance is forfeited, for that the principal did not prosecute his Writ of Error, for the purchasing of the Writ of Error was a delay of the Execution, ab initio, because he did not prosecute the same.

Coventry for the Defendant: If this be within the words of the Statute of 3 Jac. yet it is not within the intent of it: For here the principal renders himself in Execution, before the return of the Writ of Error, and so before any delay was by him; and also in this Case the Judgment was never affirmed, and therefore upon this Recognizance he is not to be charged; the Statute was made for the avoiding of unnecessary delays, here the principal party renders his Body, and it is not the meaning of the Statute, to give a double satisfaction for one and the same thing.

Coke Chief Justice. I think that this Recognizance upon the Statute of 3 Jac. and a Recognizance at the Common Law, in which the Bail is entred, are all one in Judgment of Law, the same being to pay the Debt, and satisfaction, if the Judgment be affirmed.

In 16 H. 7. fol. 2. If the Plaintiff in a Writ of Error at the Common Law be bailed, yet he may afterwards render himself in Execution; so that here in this Case, the principal rendering himself, shall discharge the Bail of his Recognizance, upon the Statute of 3 Jac. as well as it should do at the Common Law.

Haughton Justice, to the contrary, for upon this Statute the Bail shall not be discharged by the principals rendering of himself, for this was never the meaning of the Statute.

It was then further urged by Davenport, That here by the Plea of the Defendant himself, it appears that the principal did not render himself to prison in Execution, for the Plea is, that the 2. Febr. Down the principal venit hic in Curia, & reddidit se in eadem Curia, & quod per mandatum Curie Committitur, to the

Marshally,

Marshally, & adhuc remanet in the Marshally in Execution; and it is apparent, that the said second day of February was Candlemas-day, and so non dies juridicus, and then he could not render himself the same day, and this appears so to the Court judicially.

To this it was answered, that though he cannot render himself in Court upon this day, yet he may well this day go to prison, and so he may on this day well render himself to prison; and it is said further in the Plea, that he still remains in the Marshally.

It was then urged, that it is expressly here pleaded, that he did render himself, hic in Curia, & quod per eandem Curiam Committitur, and so the Plea not good.

The whole Court agreed herein, That the Plea was not good.

Coke. He doth not in the Plea here say, Quod reddidit se prisonæ, sed venit hic in Curia, & in eadem Curia, reddidit se prisonæ, and this is here impossible to be so, for here ought to be a Court-day, or no render of himself could be in eadem Curia.

Also it ought to be, in eadem Curia reddidit se, & per eandem Curiam Commisus, for the Court ought to commit him; and it is not sufficient for him to render himself, but he ought to be committed in Execution per Curiam, and this to be so, is here impossible, because it appears to us, that this second day of February, non fuit dies juridicus, and therefore this is without any help; and if this Commitment be bad, the same being, as it is alledged, to be on the Sabbath-day, this clearly is not good, because this was no Court-day, & quod ab initio non valet, in tractu temporis non convalescit, & quæ mala sunt inchoata in principio, vix bono peragantur exitu.

Haughton agreed with him herein, for if he be in prison, yet if this be so, without a render of himself, and a commitment by the Court, all is void; and as it is here alledged, it is void in Law, and therefore by the Rule of the Court for this default in pleading, Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff,  
&c.

*Webb Plaintiff against Herring Defendant.*

Entred Termin. Hillar. 13 Jac. B. R. Rot. 544.

Trespas and  
Ejectment.  
Bridg. 84.  
Cro. Ja. 415. 75.  
1 Ro. Rep. 398.  
436.  
Hob. 32.  
1 Ro. Abr. 843.  
Mo. 7. 13. 852.  
864.  
1 Ro. Abr. 835.  
Cro. Eliz. 21.

**I**n an Action of Trespas and Ejectment, and upon Non culp. pleaded, the Jury found a special Verdict, upon which the Case appeared to be, That a man being seised of certain Houses in Fæ, held in Socage, having a Wife named Barbery, a Son called Francis, and three Daughters, and being thus seised, he makes his last Will and Testament in writing, and thereby deviseeth his Houses and Land in this manner, (S.) To Francis my Son, after the death of Barbery my Wife: And if my three Daughters do fortune to overlive their Mother, and Francis and his Heirs, then I do devise the same Houses to them for their lives, and after their deaths, I do give them to my two Nephews, John Wittenbury and William Wittenbury, and that they and their Successors shall pay 3 l. Rent yearly to the Company of Merchant-Taylors in London for ever; and if they fail of payment, then I devise that the said Company shall have the said Houses for ever.

The Points moved and insisted upon in this Case.

1. Point,

1. Point, Upon the words of the Will, being to Francis his Son, (after the death of the Barbary his Wife, and Pother of Francis, and if he dies without Heir, that then his three Daughters, and Sisters of Francis, (S.) Annice, Alice, and Margaret,) to have the same for their lives.

The question is, What Estate Francis the Son hath by this Will, whether by the Devise and the Words of the Will he hath an Estate-tail, or a Fee-simple.

In this Case it appeared, that Barbary the Wife and Francis the Son were both dead, and Francis dead without Issue; the Plaintiff claimed under the Title of the two Nephews, and the Defendant under the Title of Margaret, as Sister and Heir unto Francis.

George Croke for the Plaintiff, urged for the first Point, That Francis by this Will had but an Estate Tail, and no Fee-simple, 27 H. 8. fol. 27. devise to one, and to his Heirs Males is an Estate tail: If Land is given to one and his Heirs, Habendum to him and to the Heirs of his Body, this is an Estate tail, by 22 H. 6.

25 Assisar. placito 4. Land given to one and his Heirs, Habendum to him and his Heirs, if he have Issue of his Body, adjudged to be an Estate Tail, and so is 27 Assisar. placito 15.

43 Eliz. Hortons Case, Lessor upon Condition, that he shall not assign this to his Wife, he deviseth this to his Son after the death of his Wife: Resolved, that by this devise no Estate was given to the Wife, for that then this would have been a forfeiture; otherwise it had been if it had not been for the forfeiture.

Here in this Case (as it was urged) when the Devise is to the Son after the death of the Wife, and if the three Daughters survive the Wife, and the Son, and his Heirs, then the Devise is to them for life, with the remainder over; this had been a Fee-simple in the Son, if it had not been for the limitation of the remainder over: But by the limitation of the remainder over, his intent appears, that it should be an Estate tail in the Son; for that, if it should be a Fee-simple, the Daughters should have had this after the death of the Son, without Issue, without any new limitation, for the Son cannot die without Heir, as long as he hath Sisters; and it shall not be intended, that they were but of the half-blood, and therefore to make these remainders good, this shall be but an Estate tail in the Son.

It was then urged, this to be a Fee-simple in the Son; as if a man having two Sons, deviseth his Land to his eldest Son and his heirs, and if he dies without Heirs, the remainder to the other Son; this is a Fee-simple in the eldest Son, and the remainder to the youngest Son is void.

Coke Chief Justice denied this to be so, upon the reason before given.

The whole Court agreed this difference, where the remainder (as in this principal Case) is limited unto a collateral Heir; and where the same is limited to a meer Stranger: If it had been to a meer stranger, then this had been a Fee-simple in Francis the Son, and so the remainder there had been void, because that one Fee-simple cannot be thus limited upon another; but otherwise it shall be, where the remainder is limited unto a collateral Heir, where the same is good, being but an explanation of the form.

Dodderidge Justice. As to this first Point, this of necessity ought to be an Estate tail in Francis the Son, and it cannot be otherwise taken, without great absurdity.

Coke. Every man hath lineal and collateral Heirs, (if any) and here in this Case, it is as much as if he had said, That he devised these unto Francis and his lineal Heirs; and if he die without such Heirs, then to his collateral Heirs, and this clearly is but an Estate tail in Francis.

If a man hath two Sons, and deviseth his Land to his youngest Son, and if he



dies without Heirs, then to his eldest Son in fee; this had been an Estate tail in the younger Son, for that otherwise the remainder should be void.

The whole Court clear of Opinion, That Francis the Son, by the words and meaning of this Will, had but an Estate tail in him.

2. As to the second Point, What Estate the two Nephews, John and William Wittenbury have by this Will, the devise being to them, and that they and their Successors shall pay so much yearly to the Poor of such a Company in London for ever, and if they do not pay this, that the Company then to have this for ever.

It was urged, that this is a Fee-simple in them, because it is that they and their Successors shall pay such an annual Rent perpetually: And that by the word Successors, is intended Heirs, 4 E. 6. Brooks Cases, fol. 87. placito 406. Brook tit. Estate, placito 78. Land devised to one, paying 10 l. this is a Fee-simple.

Haughton Justice. This is Fee-simple in them; the word Successors shall be intended Heirs.

Coke. Here the Land is devised to them, paying yearly so much for ever; the profits of the Land is not here found.

It is a plain Case, if Land be devised to one, and that he shall pay so much yearly to another, and to his Heirs, this is a Fee-simple in the Devisee, for he ought to pay this for ever, and to be enabled to do this out of the profits of the Land, he ought to have a Fee-simple in the Land: Also the word Successor in a Will is sufficient for Heirs; and therefore if one doth devise Land to a man, and to his Successors, this is a good Fee-simple to him.

Croke Justice agreed with him herein.

Coke. It appears by Bracton, that Successor is a good word to make a Fee-simple in a private person, because the Heir succedit patri; and therefore if one devise Land to a private man, and to his Successors, this shall be a good Fee-simple; so here in this Case, the Nephews, John and William have a Fee-simple, being in a Will where the word Successor will imply Heir; otherwise it would be in Case of a Grant, and so is the difference; and here the words, paying so much perpetually unto the Company, to be given to the Poor of the Company perpetually, and the Condition annexed, that for default of payment, the Company then to have this for ever; this doth well shew and manifest the intent of the Devisee, that this should be a Fee-simple in the Nephews.

Haughton agreed with him herein, for here he ought to be his Successor in the Estate; for if a man doth devise Land to one and to his Successors, this is clearly a good Fee-simple in him, because his Heir is to succeed him in the said Inheritance.

The Court all agreed herein, and therefore by the Rule of the Court, Judgment was to be entered for the Plaintiff according to this resolution, (both the Points being over-ruled by the Court.)

But upon the motion of Hutton Serjeant, being of Council with the Defendant, by the Rule of the Court, this Cause was adjourned till the next Term.

Afterwards, (S.) Termin. Mich. 14 Jac. B. R. this Case was moved again, and argued on both sides.

It was urged, that the two Nephews should have a Fee-simple, by reason of the annual payment limited to be made by them for ever, to such a Company in London; and Sir Richard Pexhalls Case, Coke 8 pars, cited fol. 85. there to have the Rent as long as he is to keep the Courts; so here to have the Land as long as they are to pay the yearly Rent.

As to the Estate of Francis, It was urged, that he had but an Estate tail by this Will: That the subsequent words in a Will shall explain the former; and so upon Construction of Words, as appears by 35 Affisar. placito 14. & 37 Affisar. placito

Term. Mich.  
14 Jac. E. R.  
&c.

Coke 8. pars,  
fol. 85. &c.

placito 15. and Perkins, cap. fait, fol. 35. placito 171. Dedi, &c. totam terram meam Habendum, sibi & hæredibus suis, si hæredes de carne sua habuerit, this is an Estate tail, and here the subsequent words do explain the former; and upon this reason is 5 H. 5. fol. 6. and Coke 8 pars, fol. 154. in Sir Edward Althams Case.

Here in this Case, it shall be intended to be Heirs of his Body, because a remainder is made to be dependant upon this.

19 Eliz. Dyer, fol. 357. Chicks Case: In Case of a Will, such an exposition is to be made, as that all the parts thereof may stand together.

If an Alien be made a Denizen, Land is given to him and his heirs, the remainder over; this is a good Estate tail to him, because he can have no other Heirs but lineal, not collateral.

16 Eliz. Dyer, fol. 333. Chapmans Case: In case of a Will, where a less implication shall make an Estate tail, there a Proviso to restrain alienation, and therefore an Estate tail: Here there is no Estate in Francis, in the first limitation; but afterwards, (S.) if the three Daughters overlive, &c. and then the remainder over; so that lay all together, by the meaning of this Will Francis had but an Estate tail.

Hutton Serjeant, for the Defendant urged, that Francis the Son, by this Will, had an Estate in Fee-simple, and that for this reason, because there is no remainder in them presently, but upon a meer contingency, and upon a double-contingency; and until this be made certain by the happening of it, nothing is in them before this do happen.

And 19 H. 8. fol. 8. b. by Englefield, A man doth devise Land to H. in Fee, and if he dies without Heir, that then M. to have the Land; this is a void devise to M. because that one Fee-simple cannot depend upon another Fee-simple by the Law.

And so this Case was adjourned to a further time.

Afterwards, (S.) Termin. Hillar. 14 Jac. B. R. this Case was moved again.

And for the first Point.

Term. Hill,  
14 Jac. B. R.  
&c.

Montague Chief Justice. Francis the Son here by this Will hath an Estate tail, and the same so to be taken of necessity by implication, out of the words of the Will; this proved by 16 Eliz. Dyer, fol. 330. Clatches Case.

16 Eliz. Dyer,  
fol. 330. &c.

The whole Court agreed with him herein.

As for the second point, paying to a Corporation so much yearly for ever.

Montague. This is a Fee-simple in them.

Dodderidge Justice. If one doth devise Land to J. S. paying to J. D. and his Heirs so much; this is in Law a Fee-simple in J. S. because the limitation of payment which ought to guide the precedent Estate is so.

The whole Court agreed with him herein.

And so clearly by the whole Court, nullo contradicente, for both the Points, (S.)

That first, This is an Estate tail in Francis. And

That secondly, This is a Fee-simple in John and William the Nephews; and therefore Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff,  
&c.

*Morrice Plaintiff against Baker and Elizabeth uxor ejus*  
Defendants.

Entred Termin. Mich. 10 Jac. B. R. Rot. 521.

Trespass for  
assault, and of  
a servant.  
Bridg. 47.  
1 Ro. Rep. 393.  
2 Ro. Abr. 145.

**I**N an Action of Trespass, for assaulting, beating and wounding of his Servant, per quod servitium amisit, ad damnum 40 l. The Defendant, quoad vi & armis, the battery and wounding pleads Non culp. and justifies the assault, and shews, that he was possessed of a House, and there had a Light time out of mind, That the Servants of the Plaintiff did intend and endeavour to erect another house upon a certain wast piece of ground adjoining to his house, and had erected certain timber for the house, the which house, if the same had been erected, would have stopped up his said ancient Light; and for this cause, that this would have been to his Nuisance; he stood in his own house, & cum quodam baculo, did thrust away Tho. Davis and Richard Jones, his Servants by him employed in the building; and did then throw down the timber so erected, and so doth justify.

Upon this Plea in Bar, the Plaintiff demurs in Law.

3 H. 6. f. 54. b.  
20 H. 7. f. 5.

1. It was argued by Bridgeman and Coventry for the Plaintiff, that this Plea was not good. For that the principal point of the Action, is the loss of his service, as appears by 3 H. 6. fol. 54. b. 20 H. 7. fol. 5. That an Action of Trespass lieth not, without saying, per quod servitium amisit; and the Defendant here in his justification, doth justify the battery, but saith nothing to the loss of his service; he hath therefore by this his Plea made no answer at all to the Plaintiff, for that which is the ground and cause of the Action (S.) the loss of his service, this ought to be by the Defendant confessed and avoided, or else denied, the which is not here so done; here is nothing shewed, but that they did this by the command of the Plaintiff, he ought here to have pleaded Non culp. to all; in the Plea he saith, he thrust them away, this cannot be any loss of service. He shews that Thomas Davis and Richard Jones, the parties and servants employed by the Plaintiff in the building, and that he impedivit novum edificium; and thrust them away, quæ est eadem transgressio, unde, &c.

43 Eliz. B. R.  
&c.

2. Also the Plea is not good for another cause, for he shews that he was possessed of a house, but doth not shew of what estate he was possessed, 43 Eliz. B. R. Eedes and Marches Case in a Declaration, this is good adjudged, but otherwise it is in a Plea in Bar, as in this Case; But in an Action upon the Case for a Nuisance, there it is good to say that he was possessed generally, without shewing of the Estate, because this is but a conveyance to the Action; otherwise it is here in a Plea in Bar, for that upon this Plea, no issue can be taken upon the Estate.

3. It was also further urged, that the matter of this Justification is no sufficient cause of justification. For in the Plea he saith, that they did endeavour for to erect a House, and that they did erect certain Timber, and that the house, if it had been erected, would then have been to his Nuisance; so that he threw it down before the same was any Nuisance to him, and none can divine whether it would have been a Nuisance to him or not before it happened. Also he cannot justify a battery for a Nuisance to his possession.

10 R. 2. Fitz.  
tit. Labourers  
placito 60.

It was urged for the Defendant, that the Plea was good, and 10 R. 2. Fitz. title Labourers, placito, a good Case touching a Justification; there he answers the other Objection of Conabatur, here their endeavour was manifest, a wrong attempted,



tempted, 16 H. 6. fol. 65. where one may justify, and where not, in defence of his possession, a man may justify, 19 H. 6. fol. 3. 9 E. 4. fol. 28. 18 E. 3. fol. 22. 17 Affisar. placito 24.

16 H. 6. f. 65.  
19 H. 6. f. 3.  
9 E. 4. f. 28.  
18 E. 3. &c.

That a Purchaser shall not have an Audita querela, before he be hurt.

Coke 5 pars, fol. 101. b. in Penruddocks Case in the end of it, there it is held, That a Feoffee may abate a Nufans, before he hath any prejudice by it; the reason given, that he shall prevent his prejudice, and not to stay till it happens; there the Nufans was executory, and yet might be thrown down, before the same came to be actual.

It was urged, that the Plea was good, without shewing what number of years he had in his House: If this be good in a Declaration, where more certainty is required, a fortiori, it shall be good in a Plea in Bar. As touching this, Coke 10 pars, fol. 59. in the Bishop of Sarums Case, where the difference is put between an allegation, of a conveyance to the matter, and the matter it self; and so is 11 H. 4. fol. 89. where a Prescription to a Let by a que estate is good, being in point of conveyance; and so is 19 R. 2. Fitz. title. Action upon the Case, placito 51. And here in this Case he shews, that he was possessed of the Lease of his House, only by way of conveyance, to his justification. It was urged, That the Declaration here is not good; the Plaintiff shews therein, that servientes & operarii were beaten, but doth not shew how they were his Servants.

Coke 10 pars,  
f. 59. &c.

Coke Chief Justice. He saith nothing here in this his Plea to any verberation, for he shews that he was possessed of the Lease of a House, that the Plaintiff had a piece of waste ground, juxta, &c. and that the Plaintiff Conatus fuit, for to edifie there a House, the which if he had finished, this would have stopped his Rights, and that therefore he thrust them away, and hindered them, and for prevention of this, he threw that down which was erected. The Declaration here is good, and the Plaintiff ought not to shew therein how he had retained them. The Rule which was last put is not good, being that this which is good in a Declaration, shall be good in a Plea in Bar. This Plea here amounts to the general issue. No Action is given to the Plaintiff here, if he hath not loss of his service, for this is the sole ground of the Action, given unto him for this loss of service, and if he hath no such loss, then the Servant is only to have the Action of Battery. If the Defendant had pleaded here Non culp. and then only shewed, that impedivit with a staff, the Jury would then say, that this is no battery, per quod servitium amittit, when he saith, he did but only hinder him; and so this Plea amounts unto the general issue.

As to the second matter, whether the Defendant may pull down the Nufans before the house be made, and so come to be a Nufans; I do much doubt of this; but I think he cannot do this, Nemo tenetur divinare, here it is only said Conatus fuit, to edifie this house, and rear up the timber, the Defendant hath no hurt by this, for he may afterwards leave off again; the Defendant is not to pull this down, here he would pull this down, for his intent only, whereas he may after forbear, for that melius recurrere, quam male currere, here it is said, that mollior, he laid his hands upon him. If one take my goods, in preservation of them, I cannot so do. If one comes upon his own Land and intends to come upon my Land, conatus est to come on my Land, upon this Imagination, I am to lay hands upon him, I never saw in any Book such a Justification for a Conation, because he did not do it; and I do much marvel, that any one should give such advice for such a pleading as this is, the best way for the Defendant had been to have pleaded Non culp. to all.

Haughton Justice. This Action here rests upon two points and parts. (S.) The Battery, and the loss of his service, the original is the Battery, if the Defendant answers to the battery, and doth well justify this, this is good, without saying any thing to the loss of his service. As in an Action brought for an assault by Servants; and they do justify their assault, this is good.

As to the second matter, you have come too soon, to cast this down before it was made, for if he have an intent to build a Wall, and lays the foundation, you ought not to disturb him for this his inception, you cannot pull this down.

Croke Justice. The Defendant ought to have damn. & injuriam, or his Justification not good. If he have none of these, his Justification cannot be good. It doth not here appear that he hath any damage, his Plea here amounts to the general Issue. One may cut down Boughs, if they hang over his ground; here the Plaintiff hath not builded, and therefore what he hath done, not to be pulled down.

Coke. There is no colour of any Defence to be made of this Plea. He saith also in his Plea, that he was possessed of a Lease for certain years, but shews not that this doth continue, this is not good, and this shall not be intended.

14 Eliz.

If I am upon my Land, and another upon his Land, and that he endeavours to come to me, and to take my goods, I cannot justify the coming upon his Land to beat him for this endeavour, 14 Eliz. an Action upon the Case brought, for beating of him, and his Servants, and omits these words (S.) (per quod servitium suum amisit) Judgment and damages given generally, there it was said, that it shall be intended, that these damages were given only for the battery. But here it was said, that when the Plaintiff alleges two things, and an Action is brought for both of them, and damages given generally, these shall be said to be given for them both; and therefore it was adjudged here by the whole Court, that he should have Judgment for no part; here he might have pleaded the general Issue, and this had been his best and surest way.

Judgment for  
the Plaintiff,  
per Curiam.

But such demurrs are desperate.

The whole Court clear of Opinion, that the Plaintiff here needs not to shew, how he was retained his Servant, and so the Declaration here is good, and the Justification bad, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

*May Plaintiff against Proby and Lumley Sheriffs  
of London Defendants.*

Entred Termin. Mich. 13 Jac. B. R.

Rot. 639.

An Action  
upon the Case  
for an Escape.  
2 Cr. 419.  
Mo. 852. Jo.  
201.  
Eliz. Cr. 868.  
Noy 40.  
1 Ro. Rep. 388.  
1 Ro. Abr. 99:  
Poph. 192.

**I**n an Action upon the Case for an Escape brought against the Sheriff of London and Middlesex, who pleads that he had taken away the party upon a Latitat, and that in bringing of him from Illington prædict. unto the Goal, Rescous was made of him, and so returns the Rescous, as the same was, The question was, whether this was a good return, or not?

This Case being of great concernment, was argued by Council of both sides.

Coventry, for the Plaintiff urged, that this return of the Rescous is not good, and so this is no good Plea; but that this Action upon the Case well lieth against the Sheriff, for suffering of this Rescous, though the arrest was but upon a mean Process; the Action well lies for this escape, being once taken by him, and this is proved by a President of a Case shewed in Court, which was Termin. Mich. 44 Eliz. B. R. Rot. 177. between Waldoe and Lamberd, where it was held, that a Rescous shall not excuse the Sheriff in an Action upon the Case, brought by the party upon the escape. Also it is here said in the return, that in bringing of him from

Term. Mich.  
44 Eliz. B. R.  
&c.

from Illington prædict. he was rescued from him, whereas nothing was at all said before of Illington, and so the return not good. This will be the difference (S) that a Rescous in such a Case, as is here, shall discharge the Sheriff, as to the King; but not as to the party himself. The Book of 16 E. 4. fol. 3. is against this, but Lambers Case is adjudged in point for the Plaintiff, and not upon the point of traversers, as hath been urged. And if this should excuse the Sheriff, the same would be very mischievous, for then no such mean Process should ever be served; the Sheriff may take with him posse Comitatus if he will in case of a mean Process, and 16 E. 4. fol. 3. it is not the principal Case, but an opinion there put obiter in the argument of that Case, but in Waldoes Case it was so adjudged in point, contrary to the opinion in 16 E. 4.

16 E. 4. fol. 3.

16 E. 4. f. 3.

3 H. 6. Fitz.  
title Attach-  
ment, placit. 1.  
7 Eliz. &c.

6 H. 7. f. 12.

44 Eliz.

George Croke for the Defendant, That this return is good; the party was here arrested by the Sheriff upon a Latitat, and rescued from him as he was bringing him to Prison; an Action upon the Case lieth not against the Sheriff for this; and herein there will be a difference between an Arrest upon a mean Process, and a Rescous made, and where it is upon an Execution; as to the parties remedy by way of Action upon the Case, where the Arrest is upon a mean Process, and a Rescous made, no Action upon the Case lieth for this by the party; for that upon every mean Process the Sheriff ought not to take with him posse Comitatus, 16 E. 4. fol. 3. this very Case is put by Catesby, and agreed, that during the time the Plea hangs in Process, the party shall not have an Action upon the Case against the Sheriff if a Rescous be returned, because the party may continue his Process against the Defendant; otherwise where a Judgment is given, and the party in Execution by his body, a Rescous there shall not excuse the party; where it is but upon a mean Process, there the prejudice is only the loss of the Process, and he may have a new Process; and with this difference agrees 3 H. 6. Fitz. title Attachment, placito 1. & 7 Eliz. Dyer, fol. 7. Eliz. Dyer, fol. 241. placito 74. where the Rule is put, that upon a Capias ad satisfaciendum, or a Capias utlagatum, after Judgment the Sheriff himself shall be charged for the escape, otherwise the party hath no remedy, he shall lose his Debt; but otherwise it is in case of a mean Process. As to the manner of the Plea (S) apud Illington prædict. this agreed to be idle (but the Plea being, that having been arrested in bringing of him from Illington, in the County of Middlesex to prison, he was rescued from him, this is good, 6 H. 7. fol. 12. to this purpose, where it is in Case of an Execution, this is then no plea for the Sheriff; for he ought here to take with him posse Comitatus; otherwise it is, upon every mean Process.

Coke Chief Justice. This is a very great Case, and worthy of good consideration, whether the Sheriff may return a Rescous in his discharge upon an arrest in a mean Process, the Case remembred in 44 Eliz. was so as it hath been cited, that in such a Case an Action upon the Case did lie against the Sheriff; but as to this, Qui bene distinguit bene docet, where the Arrest is at the suit of the King, and a rescous returned, potentia sequi debet justitiam, non antecederé, and the Book of 16 E. 3. Fitz. title Execution, placito 49. is so to be understood, where the party taken is rescued, the Sheriff shall be discharged for any fine to the King, because he hath not his body; but this shall not discharge him of the Action upon the Case, as to the party himself, at whose suit he was taken. The arrest here was upon a Latitat, and this in trespass declares, but with an intent to implead him in debt; this for the Jurisdiction of this Court. A Rescous is no excuse of an ill return; as it was adjudged in 44 Eliz. As to the other matter moved, if Illington be not named before, this is idle.

Coke Justice. This Rescous here shall excuse the Sheriff à tanto, sed non à toto as to the damages; this is the first time of moving this.

The Court upon this first opening, inclined to be of opinion for the Plaintiff, that



that this return was not good; but of this the Court would further advise; and therefore by the Rule of the Court, this Case was adjourned to another time.

Afterwards, (S.) Termino Hillar. 14 Jac. B. R. this Case was moved again, and argued.

Mountague Chief Justice. This is a great Case, and of great consequence, and fit to be very well considered of.

Haughton Justice. If the Sheriff takes one upon a mean Process, after a Rescous suffers him to escape; shall the Sheriff be excused for this, or not?

Mountague. For a Non seziens, as if a Sheriff refuse to execute a Process, an Action upon the Case lieth against him for this.

Dodderidge Justice. If the Sheriff suffers a Prisoner to escape, an Action upon the Case for this lieth against him. Here it is to be considered, whether it shall be so in Case of a Rescous by him, returned upon a mean Process, the party being arrested, and rescued. No power by intendment is able to resist the Sheriff, and his power, who hath posse Comitatus at his command, whether he shall be compelled to raise this force of the County for to serve and execute every mean Process that comes unto him, this is the only matter now considerable, if he be not compelled to do this, then there may be a power stronger than he.

Montague. The Law doth always suppose the Sheriff to be still with force. The point here in this Case being, whether the Sheriff arresting of one upon a mean Process, who is rescued from him, shall for this Rescous be excused, or not? Curia, Of this, adviseare vult.

Afterwards this Case was moved again.

16 E. 4. f. 3.  
Stat. of West. 2.  
cap. 43.

8 H. 4. f. 19.

Fitz. Nat. Br.  
fol. 102.

Dodderidge. The Action upon the Case here brought doth not lie, 16 E. 4. fol. 3. this is so there agreed by the Statute of Westminster 2. cap. 43. It is greatly in derogation of the King, that the Sheriff should return, that he could not have the body there, propter resistenciam. And Coke 5 pars. fol. 115. in Foliambs Case, in a Writ of Extremement, the Sheriff may take posse Comitatus, and so in a Replevin by 8 H. 4. fol. 19. where the Sheriff returns that he could not have the Feasts; for which return he was amerced. If the Sheriff takes one in execution for debt, and after suffers him to escape, there the Debt is gone, and the Process served; and therefore if he should not have in such a Case his remedy against the Sheriff by way of Action, he should then be without all remedy, but it is not so here in this principal Case, for here it is for the indemnity of the person, this being upon a mean Process he hath not by this lost his debt, but only the person which may be taken again; and therefore the Sheriff shall not be punished for this Rescous by an Action upon the Case; and by Fitz. Nat. Br. fol. 102. the last Case in his Writ of Rescous, that a Writ of Rescous lieth by the party against the Rescuors, by which it appeareth that he is not without remedy; but this Action upon the Case here by him brought against the Sheriff doth not lie.

Haughton. I did at the first much doubt of this Case, but now for that it shall be mischievous to the Sheriff to be compelled to have with him always posse Comitatus, and the party always hath his remedy, as it hath been shewed; therefore I hold, that this Action upon the Case brought here against the Sheriff doth not lie; and the Rescuor shall be doubly punished by the King, and by the party.

Croke. I did long time much doubt of this Case, but I am fully resolved, that this Action upon the Case doth not lie against the Sheriff, the Sheriff may punish the Rescuors; sub modo, this return is good; if the Sheriff returns, that he was rescued from him by a stranger, this is no good return; but if he further adds these words, Et non est Inventus in balliva mea, this is good, but not otherwise; for if he leave these words out of the return, the return then is not good; The Sheriff is compellable to make the Arrest, and if he be once in the custody of the Sheriff, there he shall be charged, but by his saying, I arrest you, he is not by this

this in his Custody, for to charge him with an Action, and here this Action doth not lie against the Sheriff.

Mountague. This is a great Case. Here the Sheriff returns, that he had arrested the party, and that in bringing of him towards the Prison, he was rescued from him. As touching this matter, these differences do appear in our Books.

The first difference is this. If in the arresting, the party is rescued, he is upon an Execution, or upon a mean Process, No Action for this lieth against the Sheriff.

The second difference; If the Prisoner be arrested, and in bringing of him towards the Goal, he is rescued from him, No Action lieth for this against the Sheriff, (as this principal Case here is) the same being upon a mean Process; and so is 16 E. 4. fol. 3. before remembred.

But if it be upon an Execution, Caveat vicecomes. But if he had arrested him, and brought him to the Goal, then it is no good return for him to say, that the Goal was broken, and so he was taken from him; as the Case in 16 E. 4. fol. 3. *Wastard Falconbridges Case* is, When a Prisoner is once taken, and in Execution, there is then a determination of all the mean Process; But otherwise it is, where he is taken upon a mean Process, for there he may have a new Process again.

By the Statute of Westminster. 2. capite 43. touching the returns of Sheriffs. *Westm. 2. c. 43.* Multoties etiam falsum dant responsum, mandando, quod non potuerunt (exequi) preceptum regis propter resistentiam potestatis alicujus magnatis, de quo caveat vicecomes, de cetero, quia hujusmodi responsio, multum redundat in dedecus domini regis, & coronæ suæ. 7 Eliz. Dyer fol. 241. upon an Execution, there is no return to be made; otherwise, where upon a mean Process; the reason is, because the Sheriff is not bound to have posse comitatus, upon every mean Process; If the Sheriff takes one upon a mean Process, before he commits him to the Goal, the party cannot have an Action for the rescous, otherwise it is where he is in Prison, where the Sheriff hath an Action given unto him, for rescous done, there the Sheriff is chargeable over to the party, and is subject to an Action, where he may have an Action, as where the party is in Execution, but not otherwise. Here in this Case, we do all agree, that the return here is good, and that the Action upon the Case here lieth not against the Sheriff.

Dodderidge. A Rescousor shall be doubly punished, for upon the return of the Sheriff, he shall be fined to the King, and an Attachment shall issue out against him.

2. The party also shall have a Writ of Rescous against him; which is provided by 3 H. 6. Fitz. title Attachment, before remembred; and Fitz. Nat. Brev. title Rescous, the last Case.

And so by the Rule of the whole Court, the return here of the Sheriff was held to be good, and by consequence, the Action upon the Case here brought against the Sheriff lieth not.

And therefore by the Rule of the Court, nullo contradicente, Judgment was entered, quod querens Nil Capiat per billam.

16 E. 4. f. 3.

16 E. 4. f. 3.

7 Eliz. Dyer f. 241.

3 H. 6. Fitz. tit. Attachment.

Judgment quod querens Nil capiat per billam.

*Howson Plaintiff, against Sir William Fountain  
Defendant.*

A Writ of  
Error.

1 Rol. R. 381.

1 Rol. Ab. 289.

**I**n a Writ of Error, to reverse a Judgment in the C. B. for him, the Error assigned was, for that the Defendant in C. B. appeared per Wilde, Attornatum suum, and no Christian Name of the Attorney is entered.

The Court was moved to have this amended.

Coke Chief Justice. This is not good, neither can the same be amended; we cannot know what is intended by this: And so when I was at the Bar, it was in the like Case resolved; where a Defendant did appear per Cutting Attornatum suum, without any Christian Name, and resolved, that the same was not good; And another Case there was here of the same nature, where a Defendant did appear per Higgins Attornatum suum, without any Christian Name, and held not good, but if it had been once right, with his Christian Name, and afterwards the same omitted: In such a Case we may well amend this, for we have here a good warrant in the Record to do this.

Dodderidge Justice agreed with him herein; and so in the Case in Dyer, where one did appear per Willburn Attornatum suum, and held not good, and that this is not to be amended.

A Certiorare  
granted.

Afterwards the Counsel for the Defendant, perceiving the opinion of the Court to be against him, that this was not good, nor yet amendable, moved the Court for a Certiorare, supposing the Record in C. B. to be otherwise; and accordingly a Certiorare was granted by the Court.

*Rudge Plaintiff, against Thomas  
Defendant.*

Covenant.

1 Rol. R. 403.

**I**n an Action of Covenant, the Plaintiff in his Declaration sets forth, That the Defendant was Parson of Dale, and did Covenant, that the Plaintiff should have his Tithes of certain Lands for 13 years; and that afterwards he resigned, and another Parson inducted, by which means he was ousted of his Tithes, and for this cause the Action brought.

Stat. of 13  
Eliz. &c.

The Defendant pleads in bar the Statutes of 13 Eliz. cap. 20. and 14 Eliz. cap. 11. for Non-residency, upon which Plea, the Plaintiff demurred in Law.

It was urged for the Plaintiff, that the Plea in Bar was not good, because it is not averred, that the Defendant had been absent from his Parsonage by the space of 80 days in a year, for otherwise, the Covenant is not void by the Statutes.

For the Defendant: It was alleged, that the pleading of the Statute of 13 Eliz. is idle, but by the Statute of 14 Eliz. this Covenant is made void; for by the Statute, all Covenants shall be all one with Leases, made by such Parsons: And in this Case, if this had been a Lease, this had been clearly void by Surrender of the Parson; and so in Case of a Covenant.

Dodderidge, & Haughton Justices. The Statutes of 13 and 14 Eliz. do not meddle with assurances at the Common Law, nor intended to make any Leases void, which were void at the Common Law; And therefore this Covenant here is not made void by the Statute, unless he be absent eighty days from his Parsonage.

Coke



Coke Chief Justice agreed herein with them: If a Parson doth Covenant that another shall enjoy his Land for 21 years, and he afterwards Resigns, he shall be bound by his Covenant; So if he be bound by his Obligation to make such a Lease, this is good, and shall bind him; and so it was adjudged in the C.B. in the Dean and Chapter of Norwich Case, when I was there Chief Justice: And so it is, if Tenant for life doth Covenant that another shall enjoy his Land for 21 years, and he afterwards commits a forfeiture, he shall be bound by his Covenant.

Dodderidge & Haughton agreed with him herein: They all agreed in this Case for the Plaintiff, and that by the preamble of 14 Eliz. it is shewed; the intent of that Statute to be to make Covenants void, within the provision of 13 Eliz. by absence for 80 days.

In this Case, by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff,  
per Curiam.

*Bacon Plaintiff, against Waller Defendant.*

Entred Termin. Mich. 13 Jac. B. R.  
Rott. 62.

**I**f a Replevin, William Waller the Avowant confesseth the Lease made to one Winchcomb, who makes another Lease to John Waller from the 25 day of May, who assigns this Lease unto William Waller the Avowant, being also seised of the Freehold for the whole term (but one day) and avows by reason of this Lease now, as a Lease made 25 Maji, Habendum a datu, for 31 years, (and from the day of the date) upon this Avowry the other demurs in Law, and for cause sheweth that here is a departure from the Lease first alledged, and by which the Avowant claims; and if no departure, yet here is a surrender of that Lease being made to him who had the Freehold.

The first Question moved when this Lease should begin, (S.) being made the 25 of May, Habendum a datu, whether it shall begin the said 25 day of May, or not; to this purpose Claytons Case, Coke 5 pars. fol. 1. remembred, and 11 Eliz. Dyer, fol. 286.

A Case between Powel and Nanney was likewise urged, which was Termin. Trin. 4 Jac. in Scaccario, where a Lease was made in like manner, as in this principal Case, and the difference there taken, where the day is parcel of the computation of time, and where it is parcel in point of Interest.

5 Eliz. Dyer fol. 218. The case of an Inrollment where the day shall be exclusive, and where not.

And a case which was Termin. Mich. 8 Jac. B. R. entred Termin. Trin. 8 Jac. B. R. Rot. 150. Lluellen & Morgans case, a Monmouthshire case, where a Lease was made, 1 Maji, Habendum a datu presentium, and declared upon a Lease made a die datus, the Jury found the Lease to be a datu presentium: The question was, whether this had maintained his declaration: It was adjudged that this finding of the Jury was pursuant to his Declaration, that the Declaration was good, and Lluellen accordingly recovered; and in this case by the Judgment of the Court, a Lease made, Habendum a datu, & a die datus, is all one.

As to the second question, whether here was any surrender of the Lease, or not; the case for this being, That Lessee for years makes a Lease to the Lessor for all the term excepting one day.

It was urged, that the Lessor hath this as a dis-joynd Lease, and not as a surrender,

A Replevin &  
Avowry.  
1 Rol. R. 387.  
2 Ro. Abr. 497;  
498. 520.

Coke 5 pars  
fol. 1. &c.

Termin. Trin.  
4 Jac. &c.

Mich. 8 Jac.  
B. R. &c.

render; being possessed by virtue of the Lease, and seised by virtue of his Freehold.

Coke Chief Justice: I would not in this Case have demurred upon this Abowry, but would have pleaded unto it, we will peruse the Records that have been cited; the best way is to waive the Demurrer (being a desperate course of practise,) and to plead to the body of the matter, and so to put the truth of the matter in issue.

As touching the Surrender, if Lessee for 100 years grants unto his Lessor all his term, (excepting one year) this is no surrender clearly, and so likewise it is if there be a saving to himself, a month, a week, or a day; this is no surrender, and this is very clear that he shall have this, as in federal; the main and principal point is, A Lease made, habendum, a datu, & a die datus, whether this be all one or not.

Judgment for  
the Avowant  
per Curiam.

As to this, The whole C. agreed in opinion according to the Judgment given in Lluellins case, that the same is all one, that the Abowry is good, and no departure; and that unless the Demurrer be waived, and a Plea to issue; by the Rule of the Court Judgment to be given for the Avowant.

*Tisdall Plaintiff, against Sir William Essex  
Defendant.*

An Action of  
Covenant.

Hob. 34.

1 Brownl. 23.

1 Ro. Abr. 847.

4 Co. 86.

1 Cr. Car. 267.

Cr Jac. 92. 172.

1 Ro. Abr. 430.

Mich. 36 & 37

Eliz. B. R. &c.

**I**n an Action of Covenant, the Case appeared to be this, Sir William Essex did Covenant with Tisdall the Plaintiff, quod haberet, possideret, & occuparet, such Land, from such a time for the space of 7 years without any disturbance, and the Plaintiff did also Covenant to pay unto him 200 l. a year Rent for the same, and being disturbed in his enjoying thereof, brought his Action of Covenant.

For the maintaining of which, and that this should in Judgment of Law be a good Lease, Sir James Harringtons case was cited, which was Mich. 36 & 37 Eliz. B. R. Rot. 226. Where it was resolved, That Articles of agreement to have Land for such a time, resolved to be a good Lease, (but Nota, That in that case there were words of demise, and also rent reserved.) In this case it was objected, It was not so, and that this should be no Lease; to this it was answered, That Articuli Cleri so called, yet the same amounted to an Act of Parliament. If one be seised of Land, and doth licence another to enjoy his Land, and to occupy the same for a time certain, this should be a Lease as it was urged. And if a Licence shall amount unto a Lease, so will a Covenant also.

Nota the dif-  
ference.

Coke Chief Justice. The difference will be between a Covenant made by one, being owner of the Land, and where the same is made by a Stranger, who hath nothing at all in the Land; If the same be made by one who is the owner of the Land, with such a rent to be paid, this shall amount unto a Lease, otherwise it is where the same is made by one who hath nothing at all in the Land; and this will be the difference. In the 1 Case it shall amount unto a Lease, but in the second Case where he hath nothing in the Land, it shall be only as a bare Covenant and no more.

Here in this principal case it was said, that the Lord of Northampton was seised of the Land, and therefore the first words because he was not the owner of the Land, did only amount unto a Covenant, and not unto a Lease.

Coke 9 pars,  
f. 45. &c.

An Objection was made, that here is no special disturbance laid, as it is in the Earl of Shrewsburies Case, Coke 9 pars, fol. 46. that here is no breach of Covenant laid, and that (impedire) is not good, without some special allegation of disturbance, that the first President for this is, Coke lib. Entries fol. 9. (impedire) as it was urged, is not sufficient, but he ought to have shewed (comment.)

9 Affisar.

It is laid here, that he did enter, & conatus, to take the possession, and they did disturb him, and put him out.

Coke.

Coke. This is a sufficient disturbance, 9 Affisar. If I have but one way to my Mill an Affise lieth, if I am hindred in the using of my way, by him who is owner of the Land. In this principal case here is a good disturbance laid.

Dodderidge Justice. If this here, as it is laid be not a breach of the Covenant, I do not then know what shall be a breach.

Coke. He doth here Covenant to do this, this shall be as against all Men, as the case in 18 E. 4. fol. 20. b. is of a general and a special Licence.

And so without any further debate, the Court over-ruled this case, that here was a clear breach of Covenant, this being a very plain Case; and therefore by the Rule of the Court Judgment was given, and so entered for the Plaintiff.

18 E. 4. fol. 20. b.  
Judgment for Plaintiff &c.

*Flemming Plaintiff, against Yates Defendant.*

Entred Termin. Pasch. 10 Jac. B. R.

Rot. 113.

**I**n a Writ of Error to reverse a Judgment given in the Court of C. B. In an Action upon the case there brought upon the Statute of 13 R. 2. capite 5. for suing the Court of Admiralty, for a thing done infra Corpus Comitatus. In which Action 20 l. damages, and 20 s. costs was given. 1. Error insisted upon because he doth not say that it was enacted by the Statute of 13 R. 2. but quod in statuto continetur, the Presidents being, quod in statuto in Parlamento tenent, &c.

Error.  
Stat. of 13 R. 2. c. 5.

Curia. Over-ruled this to be no error at all.

The second Error, that the Declaration was not good, (Si quæ facta, facta fuerit, whereas it should be (sint) and 5 Mar. Dyer fol. 159. cited.

5 Mar. Dyer f. 159.

Coke Chief Justice. If one sues me in the Court of Admiralty, I may well say signa facta, facta sunt, or fuerit, this is good, they are not to sue there in the Admiralty if they make it not to appear that the matter was done, super altum mare.

Dodderidge Justice agreed with him herein, and that this is a sufficient affirmation of the matter.

A third Error, it is alledged that apud Brisslow, attachiare fecit, & comparere, coram, &c. locum tenent' five president' the error because he saith that he sued before the Lieutenant of the Court, and doth not say he sued before the Lieutenant of the Admiralty, and because he did not say locum tenent' of the Admiral; but of the Court (Judicis five presidentis) this not good as it was urged.

Coke. They may say this as they will make their Record, the Attachment was for to appear before the Admiral or Judge, or Lieutenant of the said Court, and he saith that he was Lieutenant.

Haughton Justice, If it was locum tenent' this good.

Curia. This is their name if their Record be so, they are to be punished for their veration.

A fourth Error, because it is shewed that he appeared before such a one, nuper Judicis. Curia over-ruled this.

A fifth Error, because in the recital of the Statute of 13 R. 2. it is in this manner, (S) inter alia enactat'.

Curia. This is good notwithstanding Dive & Manningshams Case in the Case in the Commentaries, 1 fol. 65.

The Court over-ruled all the Errors assigned, and by the Rule of the Court Judgment was affirmed.

Judgment affirmed per Curiam.

The



The KING, against Sir Matthew Cary  
Junior, & Ferdinando Cary.

Indictment  
of Murder a-  
gainst two.  
1 Rol. R. 407.

**U**PON an Indictment of Murder against two. By the grand Jury, Billa vera found, as to one of them, and Man-slaughter, as to the other, how to proceed.

Coke Chief Justice. This is possible so to be, and it may be good; for the one may have malice, and the other not; he may come in by chance, and so kill the other, as it is in Plowdens Commentaries; And so was the truth of this Case, being that Ferdinando Cary, and Oseband, were in the field fighting upon a Quarrel, Sir Matthew Cary, casually riding by, and seeing them in fight, and his Binsman one of them, rides in, draws his Sword, thrust Oseband through, and killed him. In this Case, this is clearly but Man-slaughter in him, and Murder in the other, so is the Commentaries, and Mackallies Case, 9 pars 65.

Plow. com.  
Coke 9 pars  
etc.

The whole Court agreed with him herein.

Exceptions were then moved to the Indictment, the same being quod felonice, percussit, and doth not say, ad tunc & ibidem.

Coke. If so, then not good.

It was then further urged, that there was neither place, nor time shewed, quando percussit.

But as to this it was said, that there were two ad tuncs, and two ibidem.

This held to be good, by the whole Court, billa vera, as to Ferdinando Cary.

Dodderidge Justice. He is to answer to the Indictment, which is of Murder.

Coke. The best way is to have a new Indictment, for that this a not good, a new Indictment against Sir Matthew Cary, and this to be for Man-slaughter; for this finding of the Jury, cannot be so indorsed, upon this Indictment, the best way, to have several Indictments against them, and not one.

Dodderidge. In one Indictment, this may be specially so set down, and well enough.

Coke, And the rest of the Judges, you cannot proceed against him, by Indictment upon this endorsement, but upon a new Indictment. And so by the Rule of the Court, a new Indictment was to be drawn against Sir Matthew Cary, who by the Rule of the Court was bailed.

Sir Matthew  
Cary bailed.

Lingen Plaintiff, against Broughton  
Defendant.

Action of the  
Case upon a  
promise.

1 Ro. Rep. 379.

Moor 853. n.

1167.

1 Rol. Abr. 26.

**I**N an Action upon the Case for a promise, upon Non assumpsit pleaded, a verdict, was given for the Plaintiff. It was moved in arrest of Judgment, that the Declaration was not good. And as touching this, the Case was, that I. S. being indebted to the Plaintiff in such a sum, for non-payment of which, the Plaintiff purposed to sue him, for preventing of which suit, the Defendant came unto the Plaintiff, and desired him to forbear him for such a reasonable time, and if he did not then pay the Plaintiff, the Defendant promised to pay the same to him, the Plaintiff sets forth, that upon this his promise he did accordingly forbear to sue him, and

and sheweth further that I. S. did not pay him, and that the Defendant also refused to pay him, upon this the Action brought, and a Verdict against the Defendant.

It was urged for the Defendant, that the Declaration was not good, because it is not shewed therein, how I. S. became first indebted unto the Plaintiff, and this was urged upon the President in Coke lib. Entries fol. 2. Bechers Case.

2. It was urged that the Declaration was not good. The Promise being, that if he would forbear I. S. for a reasonable time, if I. S. did not then pay him, he would, and doth not shew in certain, what time this should be, that he ought to forbear him.

Croke Justice. If one be indebted to another in 10 l. a third Person saith unto him, that if he will forbear him for such a time, and if then he pays him not, he doth assume and promise to pay him; and the other doth not pay him. In an Action upon the Case for this Promise in his Declaration he shews, quod cum, such a one indebitatus fuit, unto him in such a Sum; the other assumed as before, this is good without shewing how he became indebted to him; and so it is, if one being indebted to another in such a Sum, saith to him, Forbear for such a time, and I promise to pay it. In an Action upon the Case for this promise in his Declaration, he needs not to shew how this Debt grew due to him, no more shall he do here in this principal Case.

Dodderidge Justice. Here the Verdict hath made this good, which finds that he was indebted to him in such a Sum, and finds the Assumpsit also as before, and therefore this is good, for here in his Declaration, in this Case, he shews that the other was indebted unto him in such a Sum; this he only here alledges by way of inducement to this Action, and for this cause he is not to shew how the Debt grew due; the Action being grounded upon his promise. And so by

Dodderidge, Haughton, & Croke Justices, The Declaration here is good, without shewing, (coment indebitatus fuit.)

This Case being afterwards moved again.

Coke Chief Justice said, Notwithstanding any of the exceptions taken, the Declaration is good, for here the Defendant at his request procured the forbearance of the Debt, and by this he did take special notice of the Debt, what it was, and therefore good; the Debt might grow due for divers things that the Incestate was indebted to him for, and here the forbearance is requested by the Defendant for a reasonable time, and this is good, and doth much differ from the Case, that was here adjudged touching forbearance to be per paululum tempus, which Case was Trin. 8 Jac. B. R. Sackford against Phillips, held to be no good consideration, for the uncertainty of the time. Here in this Case it is to forbear him, per rationabile tempus, tunc sequens, & dicit in facto, that he had forborn him for such a time, this shall not make it good, if bad before for uncertainty.

But the Court was clear of opinion, that the Declaration here is good; and the Court shall adjudge what shall be said to be reasonable time. Here the Plaintiff did forbear him for 8 years, here the Debt is certain, and this doth differ from the Case of forbearance, per paululum tempus, he did here forbear him for eight years, (which is a reasonable time;) And therefore by the Rule of the Court Judgment was given for the Plaintiff.

Trin. & Jac.  
B. R. &c.

Judgment for  
the Plaintiff,  
per Curiam.

*Johnson Plaintiff, against Cullamore  
Defendant.*

An Action  
upon the case  
for a promise.  
Moor 854. n.  
1169.  
1 Ro. Rep. 396.  
1 Rol. Ab. 7. 12.

**I**n an Action upon the Case upon a Promise, upon Non assumpsit pleaded, a verdict was found for the Plaintiff. It was moved in Arrest of Judgment, that the Declaration was not good, there being no good consideration therein expressed; the case being this, The Defendant being to account with the Plaintiff, pro diversis debitis, insimul computaverunt, and found upon the Account, to be in arrearages in such a Sum, & in consideratione inde the same day, he did assume and promise to pay this, at a day to come, at which time he failed to pay the same; hereupon the Action brought. It was urged that the Declaration was not good, by reason of the incertainty, not shewing, the promise to be made in consideration of forbearance, but in consideratione inde.

Dodderidge Justice. An Action upon the Case is included, in every debt upon a promise; This assumpsit here, in consideratione inde, is good, notwithstanding the Objection made against it. If he had assumed, at another day, to pay this, at a day to come, this had been good; this here is a duty, presently to be paid, or afterwards, by his promise to pay this.

The whole Court agreed with him herein, that in consideratione inde, he assumed to pay this, the same is good, without shewing any consideration of forbearance, because this was not any original Debt, but where it was an original Debt, there in consideration, that he will forbear, he promised to pay, this is good; but in this Case, here is no original Debt, but the same upon the account, is reduced unto a Debt, by the finding of him to be so much in Arrearages.

Judgment for  
the Plaintiff,  
per Curiam.

And so the Court was clear of opinion, that the Declaration was good; and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

*Pipe Plaintiff, against Alger Defendant.*

Error.  
1 Ro. Rep. 408.  
1 Ro. Abr. 485.

**I**n a Writ of Error to reverse a Judgment given in the Court of C. B. in an Assault and Battery. 1. Error in the Verdict, was this, That per sacramentum Proborum, & legalium hominum was left out.

Coke Chief Justice. This is well amendable, being in a Judicial Process.

A second Error, A Verdict for the Plaintiff, and damages given, & consideration est, per Curiam, whereas it ought to be, Ideo consideration est per Curiam, quod, &c.

Curia, Overruled this Error, all this being but the recital of the Court.

A third Error, because there was no continuance entered, after the Writ of enquiry of damages awarded.

Coke. After the Writ of enquiry of damages, there ought not to be any continuance entered. For that this is the award of the Court, and you may continue this, if you will, but no necessity there is, to do so; the return of the said Writ, is a day given to him. The Plea here is ended, by the first Judgment; the Writ of enquiry of damages, until it be returned, nothing to be done, and then the second Judgment is to be given.

2 R. 3. f. 3.

Dodderidge and Haughton Justices. In 2 R. 3. fol. 3. there is a question touching Continuances to be entered.

Coke. This is good both ways, and I have known this so used, by the course of the Court.

Nota,



Nota, That all the Clerks of the Court being demanded their knowledge herein; they all answered, that there was no necessity to have a continuance entered, after the Writ of Enquiry of damages was awarded.

The Court agreed, the Judgment to be well given, and accordingly by the Rule of the Court, the Judgment was affirmed.

Judgment affirmed per Curiam.

*Phillips Plaintiff against Wickes*  
Defendant.

**I**n a Trover and Conversion of so many Hogheads of Cyder in London. The Defendant pleads bailment of them unto him, to redeliver to another in the County of Oxon, to spend in his house, the which accordingly he had done, and takes a traverse absque hoc, that he converted the same at London aut alibi, extra Com Oxon, upon this Plea the Plaintiff demurred in Law.

Trover & Conversion.  
1 Ro.Rep.393.

The Plaintiff declares upon a bailment in London, and a conversion in London, The Defendant pleads, that the same were bailed to him, to deliver over to another in another County.

It was urged for the Defendant, That the Declaration was not good, because there is no place shewed where the delivery was made, but that was over-ruled.

It was then urged for the Plaintiff, that the Defendants Plea was not good, amounting but to the general issue.

Dodderidge Justice. The difference in our Books is this (S) where one doth justify in another County, and shews a special cause of Justification, as by reason of a special Warrant of a Justice of Peace, in a special place, there such a traverse may well be taken; but where the thing is merely personal, as here in this principal Case, and altogether transitory, there otherwise it is.

The Plea here in effect is no more than Non culp. the general issue, and so not good.

The Court agreed with him herein; and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for the Plaintiff, per Curiam.

Nota, for a Rule per Curiam. That if in any Ejectione firmæ, or in any other Action, which stirs the possession; If a Rule be given to the Defendant to answer, and he doth not, and upon this, another Rule is given peremptorily to answer, if he fails in this also, yet no Judgment shall be entered against him upon a Nihil dicit, but upon motion made in open Court; And that if any Attorney of the Court do contrary unto this Rule, he shall be for this, for the future debarred of his practice. This was then agreed by the whole Court for a Rule, to be observed at the Bar, and by the Attorneys, to this intent, that Issues shall not be used to strip men out of their Possessions.

Nota.

*Amson Plaintiff against Walcot*  
Defendant.

**I**n an Action of Trespas laid to be done 1. May, the Defendant pleads a release to him made 1. Junij, and takes a traverse absq; hoc, that he was guilty at any time after the first of June; the Question, whether this traverse be good, or not?

Trespas.

Coke Chief Justice. The day in trespass is not material, he ought here to have traversed in this manner (S) absque hoc, that he was guilty before or after 1 Junij.

38 H. 8. Dyer,  
f. 62.  
1 Mar. Dyer,  
f. 93.  
27 H. 1. f. 6. b.  
45 Eliz. B. R.  
Hobbs & Kings  
Case.

A second matter was moved in this Case, touching the execution of a Process, to Arrest one, whether the same was duly executed, or not? the same being directed unto th<sup>is</sup>, or to any of them to arrest one; two of them did execute the same, and arrested the party; whether this was well executed, or not? upon the Books of 38 H. 8. Dyer, fol. 62. & 1 Mar. Dyer, fol. 93. & 27 H. 8. fol. 6. b.

Coke. Two may well execute this, because this is for the service of the King, to execute the Process, and so it was adjudged 45 Eliz. in this Court, in a Case between Hobbs and King, and there is no question to be made of it, the Case there was a Trespass laid to be 9 Jac. the Defendant justifies by virtue of a Warrant, 10 Jac. and takes a traverse absque hoc, that he was culpable before the Warrant to him made, and did not say, before and after, and therefore the traverse held bad per Curiam. The Warrant there was unto th<sup>is</sup> or two of them, two did execute the same, and this held to be good and well executed per Curiam.

Judgment for  
the Plaintiff.

The Court agreed with him herein, that the traverse was not well taken, that the Process was well executed; and so by the Rule of the Court Judgment was given for the Plaintiff.

### Ratcliffe Plaintiff against Clark Defendant.

Debt:

**I**N an Action of Debt upon a Bond, wherein two were bound unto the Plaintiff, The Condition was, that if they, or either of them, upon request made, should pay for so many Barrels of W<sup>er</sup> as should be delivered to them, so much for every Barrel as shall be agreed upon between them; and the payment of this money by the condition of the Bond, to be made within five days after request, The Plaintiff in his Declaration sets forth, that he delivered so many Barrels of W<sup>er</sup>, and had agreed with them to pay 10 s. for every Barrel; the which sum he had requested of one of the Obligors, and for breach in not payment of the money, the Action brought; the other pleads, that there was no such Agreement made.

Coke Chief Justice. If two are bound unto one, that they or either of them shall pay so much, as before, upon request, he shews a request, and no payment; this is a good breach.

Haughton Justice. An issue is here offered, that there was no agreement, but this is here certainly shewed, and there is also a good breach shewed.

Coke. The request here makes this sufficiently certain, the request made to one, & non solvit. This is very clear, that here he hath his election to require payment of the one, or of the other, and if upon this payment is not made, this is a breach of the condition.

The Court agreed with him herein.

Judgment for  
the Plaintiff.

An Exception was then taken for the Defendant to the Declaration, because he shews, that he did request payment of the one of the Obligors, and that the other did not pay him; but this Exception was disallowed, and therefore by the Rule of the Court Judgment was given for the Plaintiff.

### Hix & Uxor Plaintiff against Harrison Defendant.

Debt.

**I**N an Action of Debt: The Case was this (S.) A feme Executrix takes a Husband, they bring an Action of Debt as Executrix, they recover and have Judgment; but in bar of this the Wilary of the Husband is pleaded, and upon this a stay of Judgment prayed.

Coke

Coke Chief Justice. By this Will, clearly the Husband forfeits nothing of the Goods which the Wife had as Executrix, for that he only had them in the right of his Wife as Executrix, and so is the Book of 21 E. 4.

The Court agreed with him herein, and so by the Rule of the Court, Judgment was given for the Plaintiffs. Judgment for the Plaintiff.

### The Bayliffs of Ipswich Plaintiffs against Martin and Parker Defendants.

**I**n an Action of Debt for Rent: The Case was this, One Denny and another were Lessors for years, by demise of the Plaintiff, rendering a yearly Rent; Denny assigns over his part unto Martin, one of the Defendants; the other Lessor makes his Will, and thereby makes Parker the other Defendant his Executor, and dies; Rent is behind after the Assignment, and after the death of the other Lessor, and for this Rent, an Action of Debt was brought against the Defendants, against Martin the Assignee, and Parker the Executor of the other Lessor, and this Action brought against them in the debt & detain; whether this Action were well brought, or not? was the sole question.

Coke Chief Justice. Two joyned Lessors rendering Rent, the one of them grants away his Interest to another, a joyned Action of Debt lies against them both.

It was urged, that several Actions of Debt should have been brought, and not a joyned Action, the Contract being here determined: If Lessor for years assigns over his term, and dies, the Assignee, and not the Executor of the first Lessor, is to be sued for the Rent.

As appears by Walkers Case, Coke 3 pars, fol. 24. where two Cases are cited to this purpose, and upon this reason, (S.) because the privity of Contract is determined by the death of the Lessor, and therefore he cannot charge him in point of Contract. Coke 3 pars, f. 24. Walkers Case.

Coke. An Action of Debt here well lieth against them both in the debt & detain, for here they are now as Tenants in Common, and no other Action of Debt could they have.

The Court seemed to agree with him herein, but would not at this time overrule it: And therefore this Case was adjourned until another time.

Afterwards, (S) Mich. 14 Jac. B. R. this Case was moved again, and much debated: And it was urged, that here the Defendants have divided Possessions, and divided Interests, (S.) the one of them by an Assignment, and the other as Executor, and therefore they ought to be severally charged with several Actions of Debt; and to this purpose 11 E. 3. Fitz. ut. Debt, placito 50. was remembered. Term. Mich. 14 Jac. B. R. this Case moved again. 11 E. 3. Fitz. ut. Debt, placito 50.

Haughton Justice. The Action is here well brought against both the Defendants: If one having a Lease for years of twenty Acres of Land, rendering Rent, and he grants over to another the twentieth part of the Land, this shall not make the Lessor to bring his Action of Debt for the rent of this twentieth part so granted over, the Lessor shall not be forced to have several Actions.

Croke Justice. Severance of the Land, shall not make a severance of the Action of the Plaintiff, if it should, great inconveniencies would follow, by the several assignments of under-Tenants amongst themselves, and of which the Lessor might not have notice, and therefore he may at all times resort for his rent to his first Lessor; and therefore here the Action of Debt, as it is joyned brought against both the Defendants, is well brought.

Dodderidge Justice. The Action of Debt is always grounded upon the demise, the which continues still one and the same, notwithstanding any alteration made by the Tenants, as if the Lessors do make partition, or do assign this over unto



twenty several persons, it would be very inconvenient to force the Lessor to bring twenty Actions against twenty several persons; the which the Law will not compel him to do.

Judgment for  
the Plaintiff.

The Court clear of Opinion, that this Action of Debt was well brought, and so by the Rule of the Court, Judgment was given for the Plaintiff.

### Jakes Plaintiff against J. S. Defendant.

Prohibition  
Tyrhe of Mills  
1 Ro.Rep.405.

**I**n a Prohibition, upon a Libel in the Spiritual Court, to have Tyrhe of Mills. Upon a suggestion of a modus to be paid for the same, and a Prohibition granted. Coke Chief Justice. In some Cases Tyrhe is payable for Mills, and in some Cases not; No personal Tyrhe by the Statute is to be paid for Mills, but where by special usage the same hath been paid, and not otherwise.

The Court agreed with him herein; and therefore upon the same suggestion, a Prohibition was granted.

Nota, A Pro-  
hibition tythe  
of Mills.

Nota, That another Prohibition in like manner was moved for, upon a suggestion of a modus, to pay so much by custom for all Mills erected, or to be erected, and this appeared to be a new erected Mill: whether the Custom shall run to this or not? upon the Statute of Articuli cleri, cap. 5.

Consultation  
granted per  
Curiam.

Coke Chief Justice. This modus cannot go to this new Mill; for an ancient Mill your modus shall be allowed, but not for the Mill newly erected, the Custom will not extend unto it; and therefore by the Rule of the Court for this new Mill, a Consultation was granted.

Nota.

Nota, Touching the Charter of both the Universities of Oxford and Cambridge, granted unto them and their proceedings, by force and vertue thereof.

8 H. 4.

Coke Chief Justice. In 8 H. 4. A Charter was granted to both the Universities of Oxford and Cambridge, to enable them in their proceedings. They by force of their Charter, did proceed in Temporal Causes, in a civil manner, their Power being first by this Charter, afterwards by the means of the Earl of Leicester, they in 13 Eliz. obtained a confirmation from the Queen by Act of Parliament, by which their Charters were confirmed, and that they might proceed by force of their Charter, as before they had done, their proceedings before by their Charter being against the Law of the Land. Popham was very much and strongly against this, but afterwards when he did see that the Act of Parliament was passed for them; Then he wished, that they would prove honest men in their proceedings.

13 Eliz. Act  
Confirmations

Coke Chief Justice. If a Minister of Justice hath warrant to Attach the goods of another, if he can do it and do it not, an Action upon the Case lieth against him.

I see no cause, but that the Universities may now proceed as before they have done, and that by reason of the said Act of Confirmation of their Charters.

The Court agreed with him herein.

Nota.

Nota, Touching Endowments upon penal Laws.

Coke Chief Justice said, He did much marvel that any one in an Endowment will recite the Statute in certain, because then a misrecital of the same in any part, shall make the Endowment vitious, but they may say and conclude, (and this is the best and surest way) Contra formam Statuti.

Nota.

Nota, Exceptions were moved to avoid an Adultery in Baron and Feme. 1. Because the Wife cannot be an Adulger, but waived. 2. The same was comparuit, for comparuerunt.

It was questioned, Whether this Writ might be thus avoided, by way of exceptions upon a motion, the Clerks of the Court affirmed, that by the course of the Court, in the same Term, such an Writ might be avoided upon exceptions by a motion in Court, but this being in another Term, it could not be avoided, but by a Writ of Error, and not otherways. It was therefore moved to have him bailed upon the Writ of Error.

The Court granted this, but withall said, that he ought to appear in person the next Term, and so assign his Errors, to reverse the Writ.

Coke Chief Justice. Order is always to be observed, for qui à jure discedit, vagus erit, & omnia, omnibus erunt incerta.

Nota, Touching a Demurrer; and what shall be said to be a good cause of Demurrer.

Coke Chief Justice. If an Action be brought for three things, and the Defendant answers only unto two of them, and saith nothing at all to the third, the Plaintiff may well demur upon him for this cause; for if in this case he Replies, all this shall be discontinued, and therefore without all question, in such a case the Plaintiff may very well demur; Herlackendens Case, 4 pars. fol. 62. remembred to prove this to be so.

The Court agreed with him herein.

### Webbs Habeas Corpus.

Upon the return of the Habeas Corpus, it appeared that Webb was amerced at a Justice-Seat in the Forest, for putting of his Sheep there to depasture, and he being questioned for this, justified the having of them there: For this his contempt, he was there fined at 13 l. and a Noble, this being of him demanded, he refused to pay it, for which refusal, he was by them committed to Prison, and being now present in Court by Habeas Corpus, exceptions were taken to the return, that the same was not sufficient for his commitment, and the Court was moved to have him bailed, and the Wook Case in 30 E. 3. fol. 10. touching the exposition of the Statute De malefactoribus in parvis was cited therein.

The first exception taken to the return, because it appears not by the return, that this was an offence within the Forest.

2. It doth not appear by the return, before whom the Justice-Seat was held, as it ought to be by the Law of the Forest.

Coke Chief Justice. As touching the Justice-Seat, before whomsoever this is held, the same is good; infra les doles de Forest, this is to be taken to be infra les boundes of the same. As to the Imprisonment, whether they may do this there, or not? I will of this advise.

Dodderidge Justice. You cannot have common of Pasture for Sheep, by the Forest Law.

Coke agreed with him herein, unless it be by Prescription; here a wrong was done in the Forest, by which the verte is destroyed, for Sheep do bite very low; the Statute of Charta de Foresta is an affirmance of the Common Law; and therefore you may prescribe against this. As to the bailing of him (which was prayd, If the Imprisonment be lawful, then he is not bailable; otherwise it is, if the imprisonment be not lawful, 21 E. 3. a good Case as touching this matter, and the trial of it by Certiorate.

Dodderidge. He cannot have Sheep there by the Law of the Forest; here he hath done a wrong, and justifies the same wrong by the Law, he ought to have punishment for it.

Bail denied  
per Curiam.

A Justification was then offered, that this Locus, in quo, was purview.  
The Court would advise as touching the bailing of him, and so without any further debate, this matter was adjourned; the party remanded, the Court refusing to bail him.

Nota.

Nota, per Coke Chief Justice & Curia, for a Rule to be observed, touching Declarations, that the Plaintiff ought to declare the same Term, or the Term after that the Bail is filed, he being in Custodia Marecalli.

Nota.

Nota, Touching amendments of Declarations, the Case was this; A Declaration of the last Term pray'd to be entered this Term, before the entry of it,

Hitcham Serjeant moved the Court, to have the Declaration amended, the same (being in Trespals) the Trespals was laid to be in (Aldden) whereas in truth, the place was mistaken, for it was (Askden) a (t) for (k.) The Defendant to this had pleaded Non culp. after this Plea pleaded, the Court was moved to have this amended.

Coke Chief Justice & Curia. This is matter material, he hath here plainly mistaken the place; we cannot amend this, being in a Declaration of another Term, to this he may plead what matter he will, we cannot amend this without the assent of the party, and if he will assent to this amendment, he may then emparl until the next Term. We do not like of such amendments without the assent of parties, the Plaintiffs best way is to begin again.

Broome Secondary informed the Court, that this is a usual course to have such Amendments, before the entry of the Declarations, but not afterwards; and that this Declaration here is still in paper, and not entered, and therefore it may well be amended.

Coke & Curia. Yet we will not give way to have this amended, without the assent of the party himself who is the Defendant; and if he will assent to this amendment, he may then have an Empanage until the next Term; this here is a material mistaking, and by this there is a good advantage given to the party, the which we cannot take away from him, after his Plea put into this Declaration; For here the Case is no other in effect, but where one lays a Trespals to be done in Dale, to this the Defendant pleads Non culp. afterwards by way of motion the Plaintiff would avoid this mistaking by way of amendment, alleging that this Trespals was done in Sale, and so would oust the Defendant of the advantage which the Law had given him; which cannot be without the assent of the party, who not here assenting, the Court refused to give way to an amendment.

Amendment  
denied.

Termin. Mich. 14 Jac. Banco Regis.

Roswell Plaintiff against Wells Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 854

Trespals and  
Ejectment.  
1 Ro. Rep. 415.  
Bridg. 49.  
Cro. Jac. 403.  
1 Ro. Abr. 502.  
505.  
Godb. 262.

**I**n an Action of Trespals and Ejectment, for the trial of a Copyhold Estate, upon a Surrender, the Plaintiff declares upon a Lease made by the Heir; upon Non culp. pleaded, a special Verdict was found, upon which, The question did arise upon the custom of a Copyhold Estate, and the surrender of the same: It being found, That by the custom of the Manor, when a Copyholder would surrender his Estate, this being out of Court, ought to be done unto two Tenants of the Manor, and



and the same, by the Custom, ought to be presented within one year after the surrender.

In this case, such a Surrender was made to the use of the Defendant, unto the two Tenants who paid the Rents to the Lord inde debita, and which two Tenants died within the year, and before any Court held there for the Manor: The question was, Whether this shall be a good Surrender, if the same be presented at the next Court held for the Manor: and whether the acceptance of the Rent, by the Lord, shall amount unto an admittance.

It was urged, that here the two Tenants died before the Surrender was presented, and that therefore the same was to come unto the Heir who made the Lease to the Plaintiff.

It was likewise urged, that the Law hath great regard unto particular Customs, and doth much favour them, as 8 E. 2. Fitz. tit. Prescription, placit. 50.

8 E. 2. &c.

Nota, That by the custom of Kent, if a man be hanged for Felony, the King shall not have annum diem & vastum, nor the Lord any escheat of these Lands in Kent, the Custom there hinders it; and so by the special custom, an Infant may devise Gavelkind Land at the age of 15 years, as appears in 21 H. 7. fol. 17. and Coke 5 pars, fol. 84. Perymans Case, touching such particular Customs.

21 H. 7. f. 17. &c.

It was then urged for the Defendant, the Point being only, Whether the Surrender here out of Court shall be good, and of force to bind the Heir, before that this be presented in Court: It was urged, that it shall bind him, so that the Lease here by him made to the Plaintiff, is not good; here by the Custom (as it was urged) a certain time is limited for the presentment of this Surrender, and this is to be at the next Court, and this is a good Conveyance to bind the Copyholder and his Heir: No Court as yet held, if any thing here hath happened, so that this Surrender cannot be presented; this peradventure may somewhat alter the Case; the cases put upon several customs in Kent, and other places, may well be agreed, but are not to be applied to this case in question.

Two Objections made against the Defendant, and his title by the Surrender: The first, That Herring the Copyholder who made the Surrender is dead, and no Presentment made of this.

This is no Objection, for one who is by wrong in possession of a Manor, may make admittances of Copyholds, being Dominus pro tempore, and this a Disseisor may do, as appeareth Coke 4 pars, fol. 24. in Clark and Pennifethers Case, this Presentment to be made of the Surrender, by the two customary Tenants before it be done, is but a Ceremony to notify this, and therefore death happening before, it shall be no impediment for to hinder this, for the Copyholder hath given all by the Surrender before, and nothing at all doth pass by this Presentment; this may be resembled to the Case of an Obligation, delivered into the hands of one as an Escrow, to be afterwards delivered, as appears by 27 H. 6. fol. 7. & 14 E. 4. fol. 2. & Coke 3 pars, fol. 35. b. in Jennings and Braggs Case, put in the end of Butler and Bakers Case, that if death happens before the second delivery, this shall make no alteration, and Coke 4 pars, fol. 29. b. in Buntings Case it is resolved in case of a Surrender by a Copyholder, that if he dies before this Surrender be presented in Court, this is not material, nor shall be any ways prejudicial to the party to whose use the Surrender was made, and Coke 5 pars, fol. 84. b. in Perymans Case the Surrender is void, if it be not presented in Court.

Coke 4 pars, fol. 24. &c.

27 H. 6. f. 7. &c.

Coke 4 pars, fol. 29. &c.

Coke 5 pars, f. 84. b. &c.

Obj. The second Objection made is, That the two Tenants who did take the Surrender, died within the year, and before any Court held.

In answer to this, it was urged, that this is less material than the death of the Copyholder, who did Surrender before the same presented; for these two Tenants are Instruments in a lesser degree than the Lord is, to whom the Surrender is made

made, they are Instruments only to testify the surrender; and the custom here is not, that this surrender ought to be presented of necessity by them who took the surrender; but if the same be presented by any one at the next Court, this shall suffice to make the surrender good; this may be resembled to the Case in 1 H. 7. fol. 9. a. where a Judge takes a Conuſance of a Fine, and dies, his Executor shall certify this Conuſance, and it shall be engrossed; and so is Buntings Case, if he dies before Presentment of the surrender, upon proof of this, it may be afterwards well presented.

It was then urged for the Plaintiff, that Herring the Copyholder who made the surrender, 28 Eliz. died, and his death is found before any Court held, his Heir enters, and makes a Lease for years to the Plaintiff, until the Presentment in Court be made of the surrender, the Title of the Heir is good, and the party to whose use the surrender was made hath no title at all, until the surrender be presented in Court; so that the point is this, a Copyholder surrenders into the hands of a Tenant, and dies; whether his Heir may enter before the Presentment of this surrender: if he may, then it is for the Plaintiff, the Defendant having no title, until he procures an admittance, and a presentment of the surrender; here the party who surrendered is dead, and also the party to whom the surrender was made is dead, before any Presentment made of the surrender; whether now after their deaths this surrender may be presented.

It was urged, that this cannot be, and that here the parties to whom the surrender was made, are but as Instruments to convey this unto the party to whose use the same was made, & nihil operatur by this, till the same be presented; for in the interim, until this surrender be presented, he who made the surrender hath still the sole Interest, and may take the Profits; this Interest remains in him, and shall come unto his Heir like unto a Charter of Feoffment, with a Letter of Attorney to make Libery, before this be made, in the interim all the Interest remains in the Feoffor, until Libery be executed; and so in case of a Bargain and Sale upon the Statute of 27 H. 8. cap. 16. of Inrolments; until Inrolment the Land remains in the Bargainor; and if a Stranger enters into this Land, he shall have an Assise, and an Action of Trespass for the Profits taken; for by this Bargain and Sale before Inrolment, it is but inchoatum, non perfectum, for this Indenture of Bargain and Sale gives nothing to the Bargainee, until the Deed be inrolled according to the Statute; so in this Case, the party to whose use the surrender was made, takes nothing at all by force of this until the same be presented in Court.

Coke 4 pars,  
f. 23. b. & c.

24 Eliz. & c.

Coke 4 pars, fol. 23. b. Pennysethers Case, A Copyhold Estate descends unto the Heir, he may enter before admittance, and have an Action of Trespass for that he hath this by descent; but he who is to have a Copyhold Estate by a Surrender made unto him, he cannot enter before this be presented, for he hath no Interest in it before the same be presented; as it was held 24 Eliz. in Homes and Dixons Case, and so the difference will be between the Heir who comes in by course of descent, the Grant being made to his Ancestor, and another stranger who comes in by course of surrender (and hath these words) (S.) Dominus concessit & admissus est; but when the Heir of a Copyholder is to be admitted, he hath only these words (S.) & admissus est, but without these words, (S.) Dominus concessit, being the words of grant of the Lord used upon every Surrender, the reason of this is, because his Ancestor had the Copyhold before.

In Perrymans Case before remembred, it is there demanded what remedy, if the Copyholders will not present the surrender made out of Court; the answer there is, (S.) caveat emptor, he at his peril is to perfect all which is requisite to his assurance, so that the party to whom the Surrender is made hath no Title, until the same be presented in Court.

26 Eliz.

26 Eliz. in Gallaways Case, the question was, whether he which surrendered might have an Action upon the Case against the Lord for not holding of his Court, and admitting him to whom the surrender was made; resolved, That the party who made the surrender might have his Action against the Lord, but not the other to whom the surrender was made; and in this case it was adjudged that until admittance by force of the surrender the party had nothing, it was only inchoatum, but not perfectum.

Dodderidge Justice demanded who should have the profits of the Land, in the interim, until the surrender be presented.

Answer was made on the Defendants part, that he to whom the surrender was made should have the same.

Dodderidge. This cannot be so, the Custom here is laid to be that he is to have nothing before the surrender be presented: No possession given unto him, before this be done: No estate nor yet any possession is given unto him by this surrender made out of Court, before the same be brought in and presented in Court, the Lord cannot have this, he being only made as an Instrument for the settling of this according to the surrender; and therefore by the death of him who made the surrender before any presentment of the same, this descends unto the Heir and remains in him.

If a Man makes a Feoffment in Fee to another, and makes him livery within the view, this is no perfect livery until the other do enter into the Land according unto this; but the Feoffor may well punish a Trespass there done in the interim, for it is but inchoatum until he do enter, which doth perfect the same.

Croke Justice. No Court is as yet held, this ought to be in a convenient time, and the Law ought to judge of this.

It is here to be considered in whom the Interest of the Copyhold Estate is until a Court be held, and a presentment made of this surrender, posito, that in the interim the Lord had destroyed his Mannor before any Court held; so that no Court held, nor any effect had of this surrender; he who is to have benefit by the surrender ought to labour the Lord to have a Court held.

If it be allowed that he which first did surrender is to have this, until presentment be made in Court of the surrender, and that he may have an Action of Trespass, for Trespass done upon the Land in the interim before presentment made of it, it will overrule this case now in question; where one comes in by way of surrender there it is said (as it hath been observed) dominus concessit, but it is not so where the Heir comes in by descent. Here the custom is that the surrender shall be good, ita quod the same be presented at the next Court by the Tenants, which Court is not as yet come, but he ought to expect it.

Haughton Justice. Nothing is here found of any custom which doth impeach this case, but the surrender to be presented at the next Court; But the great and sole matter in this case considerable is in whom the interest of the Land is, until the surrender be presented: If the surrender be to the use of another, and he is admitted by the Lord before any Court held, he by this is a good Copyholder, if the Lord admit him, this is a good admittance; if it be so here, he then to whom the surrender is made hath a good title against the Heir.

It is found here that these two Tenants to whom the surrender was made, to the use of another, paid the Rents unto the Lord, inde debita; Whether this acceptance by the Lord of these Rents, shall not be in Judgment of Law, as an admittance of the party to whose use the surrender was made to the Copyhold estate; the custom is, if the same surrender be presented at the next Court, this then is good, but in the interim the Lord agrees and accepts the Rents of him, this will go very far in the case.

Dodderidge. If he doth not say that he paid the Rents as a Copyholder, it is not material; But if the Lord before any Court held receives the Rents of the



4 E. 3.

party to whom the surrender was made as of a Coppelholder, this may amount unto a good admittance of him to be a Coppelholder according to the surrender, but otherwise it is where he receives the Rents of him generally, as here in this Case there it is but as a Receiver or Bailiff; but if he as a Coppelholder do pay the Rents, and the Lord in this manner doth accept them, this will amount unto an admittance. It is here found that *virtute sursum redditionis*, he did enter and paid the Rents, but this cannot so be, if the surrender was not presented in 4 E. 3. Two Parsons of Dale and Sale do resign *causa permutationis*, the Church by this is not void, for this is not absolute, but conditional; And so without any further debate at this time, this Case was adjourned, and rested upon a Curia advisare vult.

Afterwards this matter was moved again.

Croke Justice. A Coppelholder may surrender out of Court, by which surrender an interest doth presently vest in the party, to whom or to whose use the surrender was made.

Haughton, It is very clear that he cannot be a Coppelholder before admittance, and until admittance, the interest still remains in him who did surrender; here by the custom the surrender ought to be presented in Court, or the same shall be void, and this to be presented at the next Court after the surrender; but no Court hath as yet been held since the surrender made, and so no default hath been in this, for no presentment of the surrender could be made before a Court was held, the which time is not as yet come.

Another custom is here alledged to be the surrender out of Court, to be made into the hands of two of the Coppelholders; and this surrender to be presented by them at the next Court held.

Object. It hath been objected that this surrender ought to be presented by these two Coppelhold Tenants.

As to this the custom is not so here, but if this surrender be presented by the Homagers at the next Court, this is good, and he a good Coppelholder by this; the custom is, That if the surrender be not presented at the next Court, this is to be intended, if it be by no means presented.

But if the custom had been special, (and so found) that this surrender ought to be presented at the next Court by these two Coppelhold Tenants, unto whom the surrender was made, there it shall be otherwise, for then this ought to be pursued in the same manner, or not good; but it is not so here, and therefore the same may be well presented by the Homagers after the death of the two Tenants, at the next Court held. A Law was made in the time of King H. 5. to have continuance, until his return out of France, and he died there before his return, it was held that this Law ended by his death. Here the Estate is not in the Coppelholder until his admittance to the same. The point then here is, whether any admittance be found by this Verdict, whether an admittance of the Lord before any Court held, shall make him a good Coppelholder or not; It is here found that they entered, *virtute sursum redditionis*, but by this they are not Coppelholders. It is also found that the Lord received the Rent of them inde debita, this shall bind him, as the Issue in-tail shall be bound by his own acceptance, and such acceptance shall make a voidable thing good. It is found here that the Coppelholder paid the Rent unto the Lord, this implies an acceptance of this, the which shall amount to make a good admittance of him, and this makes him to be a Coppelholder, and the Lord is to do this, and so upon the whole matter as it is here found, the Defendant hath a good title to this Coppelhold Estate by force of the surrender, and therefore Judgment ought to be given for him.

Dodderidge. The custom here may be, that the Homage shall present this surrender; here it is indefinitely found that the same shall be presented; but it is not said by whom the same shall be presented. If by the custom these two Tenants, to whom the surrender was made, are to make presentment of the surrender and no others, they are now dead, and therefore no presentment can now be made of this  
surrender

surrender. Also by the custom, the surrender is to be presented at the next Court held after the surrender. No Court hath been as yet held. But no hold can be taken upon any of these. But for the chief matter, the Case is this.

A Coppelhold Estate is surrendered by the Coppelholder, to the use of another, before any Court held, and presentment made of this surrender. He who made the surrender died, and they who also did take the surrender died. Whether the Coppelhold Estate be in him, to whose use the surrender was made; and certainly it is not in him; This is but an inception, and nothing by this doth operate, neither is there any thing in him to whose use the surrender was made, before this admittance to the same. But if the Lord admits him, this shall make him a good Coppelholder.

Here before the presentment, and admittance by the death of the Coppelholder, who made the surrender, the right of the Coppelhold Estate, in the interim descends unto his Heir. Here it is further found, that he to whose use the surrender was made, paid the Rents unto the Lord, inde debita. The point here is, whether this shall amount unto an admittance of him by the Lord. It shall not, Bracton well observeth that these base Estates are not to be passed from one to another, without an admittance of the Lord; this acceptance here of the Rent by the Lord in this manner, as it is here alleged, shall not amount unto an admittance of him. But if he had here received the Rent of them, as Coppelholders, it would have been otherwise, and there the same acceptance of the Rent should have amounted unto an admittance, but not here as it is found, being but a bare acceptance of the Rent inde debita, for this may be done as a Servant, or a Bailiff; and this is not like the Case of a Tenant in tail before remembered; for there an Estate was in him, to whom the Rent was paid; here you ought to have an Estate in them, as Coppelholders, which is not so, and therefore this Verdict is in this defective; and if this acceptance as it is here alleged, shall not amount unto an admittance, he hath no Estate at all by this.

Croke. The custom here is found indefinitely, the Heir is here to have the benefit of his ancient title. It is found the surrender to be good, if admitted, sed quorsum hæc, but it is not found in whom this Estate shall be, until a Court be held, a presentment of the surrender, and an admittance, and until this be done, it is but inchoatum.

Dodderidge. The entry of the admittance is in this manner, (S) & admissus est inde tenens.

Haughton. In pleading it is to be so, but if there be matter here found which doth amount unto so much, this shall be good. To say that he paid this as Bailiff, to the Heir, this cannot be, for it is expressly said, (S) that he himself paid this.

Dodderidge. The payment here of the Rent, is nothing at all to the purpose if it be not said, that he did admit him as a Tenant.

Haughton. If the Lord saith to the Coppelholder, you have surrendered to the use of such a one, to which surrender I do agree, this is good, and shall make him to be a good Coppelholder.

The Court agreed with him herein, if it had been so, no benefit intended here unto the Heir, by the Custom, but by the Common Law.

Dodderidge. A surrender made out of Court to a Stranger; all do die unto whom the surrender was made, he to whose use surrender was made, enters, and payes the Rent, Nihil operatur by this to make him a good Coppelholder.

Haughton. I do doubt of this case, It is not found that he paid the Rent, due after the surrender.

Croke. It is not here found what should be done with this, if no Court was held.

The Court clear of opinion against the title of the Defendant, the same being defective in alleging of the Custom, and payment of the Rent, for if he had laid the payment, and acceptance of the Rent by the Lord of him, as of his Coppelholder, this would then have amounted unto a good admittance of him as a Coppelholder.

Judgment for  
the Plaintiff.

Dodderidge & Haughton. Otherwise it is in this Case, for he may pay this Rent as Bailiff to the Heir. And therefore the Court advised the Defendant to begin again de Novo, but as the case is here found, the Plaintiff claiming by Lease from the Heir, hath a good title. And so by the Rule of the Court, Judgment was given for the Plaintiff.

*Rich. Ackeridge* Plaintiff, against *Hester Conham*  
Defendant.

Entred Termin. Pasch. 14 Jac. B. R.  
Rot. 383.

Nota.

**N**Ota, That after a Trial, and a Verdict given for the Plaintiff; It was moved in Arrest of Judgment, That the Sheriff had made no return at all of the Venire facias, this being Alburn breve, without any return made of this, and so this is bad and not amendable, as appears Coke 5. pars, fol. 41. in Rowlands Case.

Judgment at-  
tested per Cu-  
riam.

The Court allowed of this exception, and by the Rule of the Court the same was to be tryed again.

*Hutchins* Plaintiff, against *Periam*  
Defendant.

A Scire facias.

**I**n a Scire facias upon the forfeiture of a Recognizance for breach of the Peace, the case was, The Defendant was bound to keep the Peace; he breaks it; upon this the Plaintiff sues a Scire facias, upon this Recognizance out of the Office of the B.R. upon a Trial a Verdict being given against the Defendant; It was moved in Arrest of Judgment, that in this Scire facias, there was no vi & armis, this being omitted; for that in trespass he ought to lay this to be done vi & armis, and so in a Scire facias upon a Recognizance, where Battery is laid to be, this ought to be with vi & armis according to the Presidents.

Haughton Justice. This is a Recognizance, for the keeping of the Peace, and there is contra pacem in this, and so this includes vi & armis, here it is said that he did beat such a Man; and so had broken his Recognizance, but did not say this to be vi & armis.

Judgment for  
the Plaintiff.

The Court clear of opinion upon the first moving of this, that this was well enough without laying this to be vi & armis.

And so by the Rule of the Court Judgment was given for the Plaintiff.

*Wintall* Plaintiff, against *Childe* the Vicar,  
Defendant.

A Prohibition.

**I**n a Prohibition upon a Suit in the Spiritual Court, by the Defendant the Vicar of D. for Tithes: A Prohibition prayed upon his Plea there, of a modus decimandi, to pay so much yearly to the Parson of Dale, in discharge of his Tithes, and the same Plea there disallowed.

The



The whole Court agreed, This modus, between him and the Parson, will not discharge him from payment of Tithes, as to the Vicar; and therefore by the Rule of the Court, a Consultation was granted.

Judgment for  
the Plaintiff.

*Talkerne Plaintiff, against Wright Defendant.*

**I**N an Action upon the Case upon a promise, the case being, that in consideration of 40 l. given by the Plaintiff to the Defendant, he did assume, and promise to take the Son of the Plaintiff for his Apprentice, for nine years, and to teach him his Trade, and also to find him during all that time, with Meat, Drink and Apparel, the Plaintiff sets forth in his Declaration that he had paid the 40 l. to the Defendant, and that the Defendant according to his promise, had not found his Son with Meat, Drink and Apparel, during that time; and for this cause, for breach of promise the Action brought; upon Non assumpsit pleaded, a verdict was given for the Plaintiff. It was moved for the Defendant in Arrest of Judgment, that the Declaration was not good, because he hath not shewed therein that the Defendant had taken the Plaintiffs Son to be his Apprentice, and that if he never was his Apprentice, there could be then no breach of promise. It was then urged for the Plaintiff, that the Declaration was good; for where three several Considerations are laid, and the one not depending on the other (as in this Case) there he may well lay the breach upon every one of them, or any one of them; here the Action is brought for his not finding of him with Meat, Drink and Apparel; and therefore this is to be admitted, that he had first taken him for his Apprentice before any such default could be laid to be in him, this being only a subsequent default, after his taking of him as his Apprentice.

Action case,  
upon a promise.  
Cro Jac. 406.  
1 Ro. Rep. 414.

At this time the Court inclined to be of opinion for the Plaintiff, and to disallow of this exception taken to the Declaration.

Afterwards this case was moved again, upon the bringing in of the postea, and urged for the Plaintiff, that the Declaration was good, for it shall be taken by intendment, that he had taken him for his Apprentice, the agreement being in consideration of 40 l. given, the Defendant did assume, as before, and it is laid, that the 40 l. was paid, and three several things promised to be done by the Defendant, it is included that he had taken him for his Apprentice, for the Action here is not grounded, for his not taking him for his Apprentice, but only for his not finding of him with the said necessaries, of Meat, Drink and Apparel according to his promise.

Croke Justice. The Verdict here doth not aid this. If he was not his Apprentice, then there was no cause of Action. It cannot be acceptit servum, si non posuit. The Declaration had been better, if he had shewed therein expressly, that he had taken him for his Apprentice.

Haughton Justice. The Declaration here is insufficient, this assumpsit stands upon three parts. (S.)

1. That the Defendant was to take the Plaintiffs Son for his Apprentice for 9 years.

2. He was to instruct him in his Trade, in this it is not limited for what time.

And 3. He was to find him him Meat, Drink and Apparel, durante termino predicto of his Apprenticeship.

If he hath not taken him as his Apprentice, then the term is not as yet begun, for when he is his Apprentice, he is to find him in this manner, but not before he is his Apprentice; and therefore of necessity he ought to have made an express averment in his Declaration, that he had taken him for his Apprentice; For if one do promise to make to another a Lease of his House, from such a day, to such a day, for seven years, and the other doth promise to repair this. In an Action upon the Case,

Case,

Case, brought upon this promise for not repairing of the House, he ought to lay in his Declaration, that he had made the Lease to him of the House, or the Declaration not good; so here in this Case, for if he do not take him as his Apprentice, he is not to perform the other part of the promise; so that the Declaration here is altogether insufficient, and so Judgment ought to be given for the Defendant.

Dodderidge Justice. The Verdict here shall not aid matter in Law, as this Case is, here all is true, and yet the Declaration is insufficient. Upon Non assumpsit here pleaded by the Defendant; all is found against him, (S) that he did assume as before; all this is true, and yet no cause of Action for the Plaintiff, if the Plaintiffs Son was not in fact, his Apprentice; if the Plaintiff did not offer his Son to be his Apprentice, then he cannot instruct him in his Trade, nor yet tied by his promise, to find those necessities of Meat, Drink and Apparel; and therefore the Plaintiff ought to have alleged this in his Declaration, that he had taken him for his Apprentice, and this to enable him to have an Action for this breach. In 3 E. 4. fol. 21. where an Abbess retains one for so much to serve her in the service of Husbandry. In an Action of Debt, for this, he shewed that he was retained, but doth not shew (as he ought to do) that he had served her accordingly; and for this cause the Declaration ruled to be bad: So here in this Case, the Plaintiff ought to have alleged, that he offered his Son to him for his Apprentice, he ought to have alleged sufficient breach, to entitle him to have this Action, which here he hath not done.

Croke. This doth presuppose a thing to be first done by the Plaintiff, (S) he is to put his Son to the Defendant, to be his Apprentice, for he may take issue with the Plaintiff upon this (S) that Non posuit; the Plaintiff here would have tacita Confessio, this cannot be, the Plaintiff hath here omitted the very foundation of his Action.

Judgment  
quod querens  
Nil capiat per  
billam.

The Court clear of opinion against the Plaintiff, that the Declaration was not good; and therefore by the Rule of the Court, Judgment was entered, quod querens Nil capiat per billam.

### Hodge Plaintiff, against Vavifour Defendant.

Action upon  
the Case for  
promise.  
1 Ro. Rep. 413.  
1 Rol. Abr. 12.

**I**N an Action upon the Case for a promise, the Plaintiff delivered certain Clothes to the Defendant for so much, & sic indebitatus fuit, to him in so much, the Defendant postea, in consideratione inde, did assume, and promise to pay this a year after; for not payment thereof the Action brought, upon Non assumpsit pleaded, a Verdict was given for the Plaintiff.

It was moved for the Defendant in Arrest of Judgment, that this promise should not bind him, it being said, quod postea in consideratione inde, he assumed to pay this, which promise is grounded upon a consideration that is past, and so not good to raise a promise, and here he may have Debt for his Goods.

Croke Justice. If a Man owes to another so much for certain Goods, and he demands of him when he will pay him for them, who answers at such a time, and the other agrees unto it, this is good; and the Law will here imply a tacite consideration, by the Law annexed unto it.

Haughton Justice. In consideration that the Plaintiff hath built a House for the Defendant, he did assume, and promise to pay him so much, this is executed, here the assumpsit is for Money, this is to be paid upon request; here the Defendant is clogged with a Debt continually, and therefore this is here a good consideration to raise a promise.

Dodderidge.

Dodderidge Justice. Here is a promise made for the payment at a day certain, till which time the same was forborne, and therefore this is a good consideration; here the express promise shall not take away the Action upon the Case implied, (S) if for fear he will pay here, the Action upon the Case for the first contract still remains, for if one be indebted to another in a sum of money, and saith unto him, If he will forbear him till Christmas he will then pay this to him; this is good. But if he arrest him before for this, what remedy shall he have? No Action upon the Case for this.

The Debt here always continues; and no discharge can be made of this, but by the payment of it.

The Court therefore over-ruled the exception as being of no force, and declared the promise to be grounded upon a good consideration; and therefore by the Rule of the Court Judgment was given for the Plaintiff.

Sir John Cutts Plaintiff, against Bennet  
Defendant.

**I**N an Action of Debt for Rent reserved upon a Lease for years, brought by the Plaintiff as Administrator, in the decinet, having Letters of Administration to him granted; upon Nil debet pleaded, a Verdict was found for the Plaintiff; It was moved in Arrest of Judgment that the Declaration was not good, for that he declares as Administrator without shewing forth literas administratorias, and though this be after a Verdict, this shall not help this defect.

The Court was clear of opinion that this was a great oversight in the Clerk, and that no amendment can be of this: And so without further debate it was adjourned.

Afterwards this Case was moved again, and the same matter insisted upon in Arrest of Judgment as before, the not shewing forth the Letters of Administration; this omission being matter of substance, and not aided by any Statute after Verdict, 36 H. 6. fol. 31. if an Action brought by an Executor, as Administrator, he ought to shew forth the Testament, because this is the means to enable him to his Action. As in Debt upon a Bond he ought to plead hic in curia prolat.

Dodderidge Justice. This is a very plain Case, that here he ought to have shewed the Letters of Administration; the point here is, whether this omission being after a Verdict, shall be such a material matter as shall vitiate the Declaration.

It was urged for the Defendant, that by reason of this material omission the Declaration is not good; and to this purpose a Case was remembered in 39 & 40 Eliz. between Edwards and Stapleton, in a Writ of Error, the same Error assigned for not shewing forth literas testamentarias, and the Judgment reversed for this cause, because it is matter of substance and material, and not aided by any Statute.

The Court were of opinion that this Declaration was bad, this omission being matter of substance; and therefore the Rule of the Court was, Quod querens Nil capiat per billam.



Young Plaintiff, against the Bishop of Rochester  
Defendant.

Entred Termin. Hillar. 13 Jac. B. R.

Rot. 52.

A Writ of  
Error.

1 Rol. R. 432.  
1 Ro. Abr. 764.

Statute of 18  
Eliz. c. 14.  
Coke 5. pars.  
f. 37. a. b.  
Bishops Case.

Nota, The  
difference.

**I**n a Writ of Error to reverse a Judgment given in the C. B. in an Action of *Wass*, the Bishop declared upon a Lease made by himself, whereas in truth the same was made by his Predecessor, this Error assigned and insisted upon to reverse the Judgment for this variance between the Original Writ and the Declaration, the one being of a Lease made by his Predecessor, and the Declaration being of a Lease made by himself; and that this is not aided by the Statute of 18 Eliz. capite 14. of Jeofailes, Coke 5. pars, fol. 37. a. b. Bishops Case; this very Case in effect, and reversed for this cause in an Action upon the Case for a promise; there by the Writ, the Obligation was alledged to be made by Thomas Warde and Christopher Bishop, and in the Court he was named George Bishop.

Judgment was given for the Plaintiff; a Writ of Error brought, and this variance between the Original Writ, and the Count assigned for Error, and insisted upon the point there, Whether this was aided by the Statute of 18 Eliz. capite 14. there resolved that this variance between the Original Writ, and the Count was not remedied by 18 Eliz. nor by any other Statute; and the difference taken when there was an Original Writ, which in matter of substance varied from the Count, this not remedied by the Statute; otherwise it is where there was no Original Writ at all. And so it was urged, that in this Case for this variance the Judgment ought to be reversed.

Against this, It was urged that this Case differs from Bishops Case; for there the variance was in the substance of the Declaration, in the name, being material, but not so here, being, whether he held by Lease of the Bishop or not.

Dodderidge Justice. Here is an Action of *Wass*, and the Declaration is upon one Lease, and the Original Writ is upon another Lease, the Original Writ being upon a Licence made by the Predecessor of the Bishop, and the Declaration is upon a Lease made by the Bishop himself, and so a material variance between them.

The Court agreed herein that this was a material Error, and this variance not amendable, nor any ways aided by the Statute of 18 Elizabeth, that the Judgment given for this cause is erroneous, and therefore by the Rule of the Court, for this Error the Judgment was reversed.

Judgment re-  
versed, per  
Curiam.

Lewes Plaintiff, against Walter Defendant.

Entred Termin. Trin. 14 Jac. B. R.

Rott. 39.

**I**n an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in Arrest of Judgment, that the words were not actionable, being, (S) That the Defendant said, that one John Pierce did say that Mr. Lewes the Plaintiff did say, That there was no Prince in England, ubi revera, Lewes the Plaintiff did never speak these words, and averred, That Charles the Prince was then in England: The Plaintiff also in his Declaration sets forth, that he was of good Fame and a Justice of Peace.

An Action upon the case for words,  
1 Ro. Rep. 444.  
1 Rol. Ab. 64.  
69. 75.  
Cro. Jac. 406.  
413.

It was urged that these words are not actionable, in regard, that by a favourable construction the Prince might be in another Realm, there being no certain time expressed when the words were spoken.

And it was further urged, that this was but a Report which he had from the hearsay of another.

For the Plaintiff it was urged, that this is all one, as if he himself had spoken the words.

Dodderidge Justice. If he had spoken these words in the time of Queen Eliz. this had then been true: Here it is not shewed when Pierce did say this, and this is very material; what if one should say that I. S. said, that a Stranger said, that the Plaintiff had murdered such a one, whereas in truth he did not say so.

The Court demanded to see the president which was cited of the Lady Morrisons Case.

Haughton. By the ancient Law, he which reports false news of another, ought to bring in the party who spake it, or else he himself to have the same punishment that was to be given to such a reporter of false news.

Afterwards, at another time two presidents were produced, and shewed to the Court in this Case; the one of them between the Lady Morrison and Lane, 5 Jac. in B. R. the other 41 Eliz. the Lord North and Conneys Case, a Case of hearsay, as this Case here is, and adjudged that the Action did well lie, and the same affirmed here in a Writ of Error. 5 Jac. B. R. &c. 4 Eliz. &c.

The first president, that he heard another speak such words of the Lady Morrison, by reason of which words she lost her Parriage (the words said to be spoken by a Scot) the Plaintiff had Judgment here, and the same affirmed in a Writ of Error in the Exchequer Chamber.

Haughton. This Action is grounded upon the Statute of Westminster the first, cap. 34. for contriving of false news; and 5 R. 2. cap. 5. He ought to bring in the party which he hath averred to have spoken the words, or he himself shall be adjudged to be the speaker of them. Stat. of Westminster the first c. 34. & 5 R. 2. c. 5.

Dodderidge. The matter here doth not rest upon the report, but upon the substance of the words, for that the Prince might be out of the Realm when the words were spoken.

Haughton. The averment here, that no such words were spoken, makes this matter strongest against him.

The Court at this time inclined to be of opinion, that the words were not actionable, because the time is not shewed when the words were spoken; but for the

matter of the report of the other, this is good and actionable, and that according to the two presidents before remembred, and adjudged in point; and so without any further debate, this Case rested upon a Curia advisare vult.

Term. Hillar.  
14 Jac. B. R.  
this Case mo-  
ved again.

Afterwards, (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and two matters insisted upon in Arrest of Judgment.

1. Because this is but a Report that the Plaintiff did say so, and not that he did say so himself.

And 2. That no Action lieth for these words.

The Duke of  
Buckingham  
Case.

It was urged for the Plaintiff, that the Action well lieth for these words, they being spoken on purpose to draw him into displeasure, and to cause him to be suspected in point of his Allegiance, and that is as much as to say, that there was no King, for Rex est princeps populi, these are words of very great scandal: One said of a Peer of the Realm, (S) of the Duke of Buckingham, that he had no more Conscience than a Dog; these were held scandalous words, and an Action de scandalis magnatum lieth for these words; and if spoken of another person, of a Gentleman, an Action upon the Case lieth.

Sir William  
Walgrave a-  
gainst Agard.

Sir William Walgraves Case against Agard, who said to his Servant, I am a true Subject, but thou servest no true Subject, adjudged, that for these words an Action upon the Case well lieth, because it was laid, that the words were spoken maliciously, to draw his life in question, as in this Case here.

Also it was there in that Case adjudged, that to say, That such a one is not the Queens Friend, are words actionable, and that Case was affirmed in a Writ of Error in the Erchequer Chamber.

It was urged for the Defendant, that if there had been laid a communication to have been of the King; and of his Issues, there it might then have been otherwise; but here the words are spoken suddenly, and it might be, that at the same time the Prince was in Scotland; and for one to say that the Prince is not in England, and that no Prince is in England, is all one.

1. Haughton. It is plain, that if he speaks of the Prince, that the Action lieth, notwithstanding this be of the hearsay of others.

But for the second matter, If scandalous words be spoken of a Man, who is not fully designed by the words themselves, but by an innuendo, in this case the Action will not lie: As if a Man hath four Sons, and one saith, that one of the Sons of I.S. (he having four Sons) did commit a Robbery (innuendo such a one of them) for these words thus spoken no Action lieth; but if it be denoted in certain, as if one doth say unto a Feme-covert, that her Husband is a Thief, an Action upon the Case well lieth, because the person defamed is certainly designed; but here in this case now in question, the slander is not certain, but by an innuendo, for it is, that he said that there is no Prince in England, (innuendo, Charles the Prince of England,) every Duke is a Prince, and so the words as they are here laid, are too general: And Walgraves Case is not like to this Case, for there it is laid that he did serve Sir William Walgrave, and so the words as they are here laid, are not actionable.

2. Dodderidge. The Action as it is brought, well lieth: It is agreed that the words themselves are actionable; the words clearly are not enforced by the innuendo, it doth not rest here upon the innuendo, but upon the denotation of the person.

If one saith the Parson of Dale hath committed such a Robbery, an Action upon the Case for these words well lieth, if he aver in his Declaration, that he was the Parson of Dale when the words were spoken.

This Case hath been here adjudged, words spoken to a Feme-covert, (S) The Husband hath committed such a Felony, an Action lieth for these words; for here the person of whom the words were spoken is sufficiently described; so here in this



this case, the words themselves sufficiently design the person; with us here, Dukes and Earls are Princes in their degrees, because they do wear Crowns: But when speech is of the Prince, by this is meant the most eminent, where here in England one speaks generally of the Prince.

It is to be understood the eldest Son of the King, so here is a sufficient denotation of the person of whom the words were spoken, and therefore the Action here is well maintainable, and so Judgment ought to be given for the Plaintiff.

3. Croke agreed with him herein, that the Action well lieth: But if the person was to be noted by an innuendo, the Action would not then lie, but here the person by the words themselves is well designed: If one will say to any of us, That there is no Prince, he ought for so saying to be presently imprisoned, qui bene interrogat, bene docet, these words are scandalous, being such as shall make the party speaking of them, in danger of his Head and Life, & fama, fides, & occultus, non patimur ludum; here is a sufficient denotation of the person, the hearsay of another is not material, the Action well lieth, and Judgment ought to be given for the Plaintiff.

Mountague Chief Justice agreed with them herein, that these words are actionable, and that they are here very well explained.

It is true, that in an Action upon the Case for words, 1. You ought to make the same Constare de persona; 2. Verba applicare ad personam; here in this Case both these are well done, when he saith, The Prince, it cannot be intended of any other than the eldest Son of the King: An innuendo shall not supply defects, that which is doubtful it will make plain, but that which is wanting cannot be supplied; here it is explanatory, we are not here to understand more Princes; words scandalous spoken of a Subject, shall be taken according to the rule of Law, in mitiori sensu, but when they are spoken of the King, or Prince, and are touching matter of Allegiance, they are there always to be taken in graviori sensu; here the words are scandalous, for which the Plaintiff had just cause of Action, the Declaration good, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for the Plaintiff, &c.

*Milward Plaintiff, against Maby Defendant.*

Entred Termin. Pasch. 13 Jac. B. R.

Rot. 680.

**I**n a Writ of Error to reverse a Judgment given in the Court of C. B. in Error. In an Action of Trespass for an Assault and Battery, where the Plaintiff declared of a Battery done 1 Maij, to his damage of 40 l. the Defendant imparls till the Term following, at which time the Plaintiff declares again of a Battery done 2 Maij, in the same year, against the same Defendant, and upon this Roll it is not entred, (alias prout patet) but this is as a new Declaration, and another Attorney in this, and he declares to his damage of 100 l. upon Non culp. pleaded, Verdict and Judgment was given for the Plaintiff, for the reversing of which Judgment, a Writ of Error was brought: The Error insisted upon, was this variance between the two Declarations; and to this purpose a Case was cited in the time of Queen Eliz. between Warner and Winch, in an account for 20 l. received: In the Imparlance Roll he declared for 18 l. and in the Plea Roll for 20 l. and for this variance, being assigned for Error, the Judgment was reversed.

It was urged, that in the C. B. one Declaration is there before the Impar-  
lance, and a second Deliverance after the Impar lance; but that these two do make  
but one Record, the first is that upon which they proceed, and this is the chief Re-  
cord, and it hath been here resolved, that if the first Declaration be good, and the second  
bad, the same varying from the first, that the Judgment shall be given upon the  
first, which is good, and the second shall be void, this being but a recital of the first;  
and this variance in the second, from the first, is but the default of the Clerk, and  
shall not make the first Declaration to be vitious, but may be amended; but if the  
first Declaration be bad, and the second good, this shall not be amended; for that  
this is a material variance, and shall make all the proceedings to be erroneous. The  
second is to be amended, and made to agree with the first, but not e converso. And  
this as it was urged, hath been the usual course of the Court.

Stat. of 18  
Eliz. cap. 14.

It was further urged, that if here the second Declaration which is upon the Im-  
par lance Roll, shall be intended to be a new Declaration, then this is aided by the  
Statute of 18 Eliz. capite 14. of Jeofailes, because the same is then without any  
Original; but if the Declaration, upon the same matter doth vary from the Ori-  
ginal, this is not aided.

Dodderidge Justice. If a Man brings an Action of Trespals for a Battery done  
the eighth day of May, and afterwards in another Term he declares of a Battery  
done the ninth day of May, shall these two Declarations be taken, and intended to  
be upon one and the same Original, when they do so much vary, and several At-  
torneys & this cannot so be.

Coke 5 pars. fo.  
37. in Bishops  
Case.

Haughton Justice. In Bishops Case, Coke 5 pars. fol. 37. There the variance  
was between the Writ and the Count, and yet the same was taken to be a Decla-  
ration upon one and the same Writ.

Croke Justice. The truth of the Case is, that all the proceeding is upon the first  
Original; and therefore this is a variance between the Original, and the second  
Declaration on the Impar lance Roll.

Dodderidge. In the second Declaration they use to enter, (alias prout patet) and  
so by this the same to have reference unto the first Declaration.

It was then affirmed unto the Court by Chibborne Serjeant, and George  
Croke, That in a Bill of Priviledge, and in a Scire facias they use to make this  
entry, but not in the other Actions.

Haughton. They in the C. B. do certifie both the Declarations, for one and the  
same Record, therefore it cannot be otherwise intended, but all to be upon one and  
the same Original.

Dodderidge. It may be that they are several Trespalses, for any thing that  
appears to us to the contrary; and it may be, that he having mistaken himself in  
the first Action, hath brought this new Action. The better opinion of the Court  
seemed to be, that the Judgment was well given, and not erroneous.

*Milward Plaintiff, against Wats Defendant.*

Entred Termin. Trin. 14 Jac. B. R.

Rot. 1527.

A Writ of  
Error.

**I**n a Writ of Error to reverse a Judgment given in the C. B. in an Action of  
Trespals and Esedment, The Plaintiff declared upon the Impar lance Roll,  
upon a Lease made 21 Januarij 10 Jac. habendum a vicesimo Decembris, in  
the same year for 4 years; and upon the Issue Roll, he declares upon a Lease made  
30 Januarij

30 Januarij 10 Jac. habendum a vicelimo Decembris, in the same year for four years; and upon Non culp. pleaded, the Jury give a Verdict for the Plaintiff, upon the later Lease laid to be made 30 Januarij, and Judgment given for the Plaintiff, to reverse which Judgment, a Writ of Error brought.

The question moved, and insisted upon, was, whether these, by any intendment, may be taken to be one and the same Lease, or divers.

The Court clear of opinion, that if Error be assigned to reverse a Judgment, which proves to be no error, yet if there be other errors appearing unto the Court, in the Record, the Judgment for these Errors is to be reversed.

The Verdict was here found for the Plaintiff, upon the later Lease, of the 30 of Januarij.

The Imparance Roll is the warrant for all; and here the Plaintiff hath declared upon another Lease differing from that in the Imparance Roll.

Haughton. The point of the Action is that, This is of one and the same term; and between one and the same person, and here the Ejectment in both is laid at one and the same time, but the Leases do vary, here the second Lease doth vary from the first, and therefore cannot be intended to be the same Lease.

If upon the Imparance Roll, the Plaintiff declares in Debt, and upon the Plea Roll, he declares in Trespass; and the Plaintiff hath Judgment, this is a material variance in a Writ of Error to reverse this; here the variance makes the Judgment erroneous, the Leases being laid to be upon several days.

Coke 5 pars, fol. 37. in Bishops Case before remembred, it is no Declaration without an Original, the same is not aided by the Imparance Roll, here the Declaration is in an Ejectione firmæ, and because the variance here is in the point of the commencement of the Lease, no Judgment ought to have been given, the Declaration not being good, varying from the Original.

Dodderidge Justice. It may be, that he having at the first mistaken the Action, he begins anew in the second Declaration. It is good to be well advised of this, if one declares in one term, upon a Lease made 21 Januarij, and in another term, without an Original, declares upon a Lease made 30 Januarij, to begin from the 20th of October before. It is fit that the course of the Court in such a case be known, whether to have a new Declaration, or whether the second Declaration be but a rebiving of the first. In the Court of C. B. they there use in the second Declaration for to enter, (alias prout patet) In every Term they are to begin all again; here we had a Case of the Bishop of Rochester, upon a variance. In the first Declaration, he declared of a Lease made by himself; and in the second, upon a Lease made by his Predecessor; and for this variance the Judgment was reversed.

Dodderidge & Croke of opinion that this here ought to be amended, and to agree with the first.

Haughton doubted of this; ideo Curia advisare vult, as touching the usages, and the course of the Court for this,

The whole Court agreed in this, that the second Lease cannot be intended to be the same with the former. In the first Case, it is a Lease presently, in perception of the profits; in the second, it is only a Lease in point of interest, and therefore if the second Declaration shall not be intended to be upon the first Original, it is not then good, but variant from the same.

Another Error was moved, (S) they being two joint-Tenants in the Ejectione firmæ; The Jury find him culp. of a moiety, and for the other moiety they find a special Verdict.

The Court held this to be no Error.

Dodderidge. If one declares in an Ejectione firmæ, upon a Lease made of certain Land, and he hath title but for a moiety, the Jury are not to conclude upon the moiety,



moiety, for they are not to judge upon this, but the Court; here the Jury find him guilty for a moiety, and for the other moiety they find a special Verdict; here they may conclude upon the moiety, for it may be he entered into one moiety, and not into the other; but if he declares upon the whole, they cannot find him culp. of a moiety.

The Court utterly disallowed of this last Error; And inclined to be of opinion for affirmance of the Judgment, but the same was not pronounced, nor yet moved again afterwards, but it was ended between the parties.

*Elkin* Plaintiff, against *Wastell* Defendant.

Entred Termin. Mich. 13 Jac. B. R.

Rot. 204.

Error.  
1 Rol. R. 411.  
1 Ro. Abr. 216.

**I**n a Writ of Error to reverse a Judgment given in an Action upon the Case, for a promise, the Case was this, (S) Wastell the Plaintiff shewed, that it was agreed between him and Elkin, That whereas Wastell was seised of a House, and of certain Land, that he should surrender the same to the use of the Defendant Elkin, and that he was to give him for the same 560 l. and that if he sold the same away again, the Plaintiff was to have the moiety, for which he should sell the same, over and above the 560 l. he shewed that accordingly he surrendered to Elkin the Defendant (but doth not shew that he was admitted) and that he sold the same over to another, (who was admitted) for 80 l. more than the 560 l. The Action brought for the whole, for the 560 l. the Plaintiff was barred, because he had received this, ideo in misericordia pro falso clamore, and for the residue, he recovered and had his Judgment; for the reversing of which, a Writ of Error was brought.

Divers Errors were moved, and very much insisted upon.

Errors.

1. The first Error, because the Plaintiff shewed in his Declaration, quod seissus fuit in domino ut de feodo, secundum consuetudinem manerij de Ramelden, of the House, & de una virgata terræ nativæ, and doth not shew that the same was Customary Land.

The Court agreed they could not intend this to be Copyhold Land, but that he ought to have alledged expressly, that this was held by Copy, or to have shewed some such matter.

2. A second Error, It is alledged, that it was agreed between them, that the Plaintiff should surrender, and that the Defendant should give him so much Money, and they do not alledge a promise to surrender.

As to this, It was ruled by the Court, that (agree) implies a good promise.

3. A third Error, because it is not shewed that the Defendant was admitted according to the surrender.

This Error the Court also over-ruled, because the consideration is laid to be that he should surrender, and not that the other should be admitted.

4. A fourth Error, The consideration is, that the Plaintiff should surrender to the Defendant, and that the Defendant should give him 560 l. and if he sold this again for more, that the Plaintiff should have the moiety of so much as he should receive, more than the 560 l. the Error herein alledged was, because for one part of the promise the Plaintiff was in misericordia, and for the second part, the Judgment is, that the Plaintiff shall recover, and this is all but one promise, although it extends it self unto divers branches, and therefore as it was urged, the Plaintiff ought either

to have been barred for the whole, or to have recovered, and not to have been in misericordia for any part.

To this answer was made, that this was no Error, for that the Plaintiff here demanded the 560 l. upon the first part of the promise, and because there were payments made of this, and acquittances given, the Plaintiff was barred, *ideo*, for this in misericordia, but for the residue, for which the same was sold above the 560 l. the Plaintiff recovered, the same being but one promise, yet for two several things, and so the Judgment was well given.

Coke. It is plain, if there be but one consideration; although divers branches, yet the same is all but one promise; as to this, the presidents are fit to be seen, where upon one promise, which consists upon several branches, part performed before the Action brought, whether the Plaintiff shall be for this in misericordia pro falso clamore, the other part of the promise not being performed. I think he shall not be in misericordia in this Case.

Haughton Justice. If this had not been here laid, to be such Land as is surrenderable (S) Copyhold Land, then there had been no consideration at all.

Coke agreed with him herein.

It was urged, and 3 E. 3. cited for it, that a Man may be seised of *fr̄*-simple Land, secundum consuetudinem manerij.

Coke. In consideration that you shall surrender to me, I promise to pay you so much if the surrender be made; but this is void being of *fr̄*-simple Land, and by this the consideration fails, because it appears not, that the same was Copyhold Land.

As to this Error, because he doth not alledge an admittance. This is no Error at all, for the party ought to sue to be admitted, the Plaintiff hath done all which in him is, and all which he ought to do, for he hath surrendered to the use of the other; and this is good, and he to give 560 l. for this Copyhold, and if he sells the same away for more, then to give him also the moiety of the overplus, the surrender was made accordingly, afterwards he sold this for 80 l. more than the 560 l. forty pound of which was due to the Plaintiff, this not paid, but he shewed an acquittance for 560 l. adjudged this to be no bar for the 40 l. but the Plaintiff also demanded the 560 l. this shall not be a bar to him, for the other 40 l. but as to this, he ought to recover. And as for this, because the Defendant hath not paid this, he is to be in misericordia.

An Objection was then made, that here the promise was not made to pay the 40 l. but the moiety of that for which he should sell the same, over and above the 560 l. and here it is laid according to the promise to pay the moiety of 80 l.

Coke. Here is but one promise made, and if he omits one part, then Non assumpsit modo & forma, is good for this.

It was then urged, In consideration of a surrender to be made to the use of another, the party to whose use the surrender is to be made, doth assume and promise to pay him so much; he ought to shew, that this is Copyhold Land, for this may be *fr̄*-simple Land, and as it was urged, it hath been here adjudged, that *fr̄*-simple Land may be surrendered (S) by the custom.

Coke. It is sufficient to say that he surrendered *fr̄*-simple Land, secundum consuetudinem manerij generally, without shewing specially the custom to be so.

Afterwards, at another time this Case was moved again; and it was urged, that the assumpsit here is grounded upon the surrender of a Copyhold Estate, to pay so much Money, and it is not shewed that the Defendant was ever admitted unto this Copyhold Estate, according to the surrender, and that if he was not admitted he cannot surrender this again.

As touching the misericordia for the Plaintiff, who recovered. It was urged, that

that where the Plaintiff is barred in part of his demand, there for this he ought to be in misericordia: And it was further urged, that if one promise but a release of part, it shall be good for the whole.

Haughton. Although it be but one promise, yet the same may well extend to several things.

Dodderidge. If it be but one promise, a release will extinguish all. The question here will be, whether they are distinct promises or not. I take them to be two distinct promises.

1. If he surrender, he then assumes to pay him so much, (S) 560 l.

2. If he surrenders and sells the same away to another, then he doth promise to give him the moiety of what he shall sell the same for, over and above the (560 l.) so that they are two several and distinct promises, the one from the other, and the release doth not go to the later part of the promise; but if one promise, then all is gone by the release. If one enters into a Bond, afterwards the Obligor doth release unto him all Actions; afterwards he enters into another Obligation. The Obligor after brings an Action of Debt upon both the Bonds, the Defendant pleads the release of all Actions, he shall have a Judgment upon one of the Bonds, but for the other he shall be in misericordia.

Croke Justice agreed with him herein, that they are here several and distinct promises, and that the Plaintiff shall be amerced pro falso clamore.

Haughton. If one be bound to another by his promise, to do and perform two things, the party may well by word, free, and discharge him of part, and so to make this several.

Dodderidge. If it be one entire thing, I doubt whether he may discharge part of it by his release; but here they are several and distinct; the release of the first part here, is not any release of that sum which he is to pay, being the moiety of the overplus, for which he shall sell the same over and above the 560 l. If a Man sells two Horses for 20 l. the one of them being the Horse of a Stranger, the other not, but his own, if the one be defeated he shall yet have an Action for all the 20 l. for that the contract is entire, as appears 24 H.8. Brooks Cases, fol. 9. placito 52.

24 H. 8. Brooks  
Cases, fol. 9.  
placito 52.

Nota, That as touching this point, the Judges all agreed that the Judgment was well given, and ought to be affirmed.

As to the other matter before moved, (S) that here are two several surrenders alleged, and it is said that the last Surrender was admitted, but not the first.

To this Haughton Justice said, That if a Copy-holder surrenders his Estate to the use of I. S. who again surrenders the same to the use of I. N. and the Lord admits I. N. this is good; For the acceptance of the surrender by I. S. is in Law an admittance of him.

And so if a Copy-holder surrenders his Estate to the use of I. D. and the Lord meeting with him, saith, Such a surrender is made to your use, to which I do agree, or I am content therewith, and that you shall be my Tenant; these sayings shall amount unto good admittances, and shall make him to be a good Copy-holder, without any further admittance.

Dodderidge. If a Man hath a reversion, and grants this to another for so much. And if he grant this over to another for more, then to pay the moiety of the overplus which he had gained; the grant is made to him, and he grants the same over for more; If I bring my Action upon the Case upon the promise, I ought expressly to say, That to my first grant, the particular Tenant did attain, so here he ought to shew an admittance of him upon the first surrender, to enable him thereby to surrender this over to another, the which he cannot do, if he himself was not admitted upon the first surrender made to him, or to his use, and so this ought to be shewed.

Haughton



Haughton. The pleading is good as it is, without shewing the admittance; this shall be intended, the same not being the essential part of a Copy-holder, for he may be a good Copy-holder without admittance.

Afterwards at another time, this Case was moved again.

Haughton. It is mentioned in the Record, that such a day in March the Writ of Error was received, and afterwards in June following, a procedendo was granted to them to proceed: The Writ of Error was brought after the award of the Court, but before any Judgment was entered, and therefore not well brought; and so a procedendo to the inferior Court, sed quia Nescitur quæ damna, ideo a Writ of Enquiry of damages granted, and before the return of this, the Writ of Error brought, and before any Judgment given, the matter resting upon a Curia advisare vult.

Dodderidge. The Writ of Error is here brought, after the award of the Court, and before any Judgment given, and so the Writ of Error, and the procedendo are both of them idle, and to no purpose, and it resteth now, as if no Writ of Error had been brought; and is like unto the case in a Writ of account, the Writ of Error to be, si judicium inde redditum sit; then to certify the Record, here the Court received the Writ of Error, but it is not shewed between what persons, nor yet in what cause this is, so not good.

A matter of Discontinuance was then urged.

Upon this, the Clerks of the Court being demanded, did certify the Court, that after the matter rested upon a Curia advisare vult, day was to be given to the Plaintiff, usque, with a cessat quousque.

Dodderidge. Here the matter is now upon a point of Discontinuance, whether it be discontinued, or not, upon the Writ of Error; there it is entered, cessat placitum quousque, without saying, usque ad proximum terminum, or to such a time certain, as the use is to be in this Court, cessat quousque, this shall amount unto a Curia advisare vult: It is here to be considered, whether there ought to be a continuance entered to a day certain, or not.

Haughton. It is no continuance, if it be not unto a day certain.

Dodderidge. It is not said, quousque proximum terminum, nor yet quousque proximam curiam; if it had been so, this had been a good continuance, but not so as it is there, and therefore by the Rule of the Court, the Judgment was affirmed, notwithstanding any of the former Errors assigned, which were all overruled by the Court, only some doubt was conceived, upon the point moved of the discontinuance, wherein only the Court was not fully satisfied, but yet agreed the Judge-

Judgment affirmed.

*Abbotts Plaintiff, against Johnson  
Defendant.*

**I**n an Action of Debt upon an Obligation, the Case was this: the Plaintiff was bound in a Bond, as Surety with the Defendant, for payment of money upon a day to come, and had a Counter-Bond from the Defendant for saving of him harmless; the Defendant paid not the money at the day; upon this his default, the Plaintiff brought his Action upon his Counter-Bond: To this the Defendant pleads non damnificatus, the Plaintiff replies, and sheweth all this matter; and that he requested the Defendant to pay this money, which he did not do; unde upon this, the Defendant demurs in Law.

The sole point insisted upon, was, Whether this non-payment of the money

Debt.

H h

at

at the day by the Defendant, be a present forfeiture of the Counter-Bond, or not, without any other damage hapning thereby unto the Plaintiff.

It was urged for the Defendant, that this is no forfeiture of the Counter-Bond, because he is not as yet any ways damaged by reason of this default; no process being sued out against him; 18 E. 4. fol. 27, 28. this matter there debated; where the condition of the Bond was for saving of him harmless, being bound for the other; the Defendant there pleaded, Quod non fuit damnificatus; the Plaintiff there shewed, that a writ was affirmed against him, so that he durst not go out of his House about his business; and so by this he was damaged.

It is there urged by Choke, that this is no forfeiture; till the Sheriff hath arrested him, for though a Capias be out against him, peradventure the Sheriff will not take him, nor execute his Writ, and then no forfeiture.

It was urged therefore, that he ought in fact, to shew some particular matter of damnification.

On the other side it is there urged by Littleton, that he had notice of the Capias, and that therefore he ought to appear in person, or be urlage, and so came to London, retained an Attorney; and by this damaged.

2 E. 4. fol. 15: The Condition of the Bond there was, that the Defendant, at his own costs, should warrant and defend to the Plaintiff certain Land for twelve years, of which he had enfeoffed the Plaintiff; and this against all persons; if ousted by a stranger, the Bond forfeited by the word defend; 26 H. 8. fol. 3. b. 16 Eliz. Dyer l. 328. and 2 H. 4. l. 9. a. b. to this purpose, 4 H. 7. l. 12. Brook tit. Conditions, placito 128, 129. 40 E. 3. fol. 20. he is to shew how he saved him harmless.

Coke 5 pars. fol. 24. in Broughtons Case, there is a particular Damnification shewed, the Plaintiff himself paying the money; but it was urged, that the non-payment of the money at the day, is no present breach nor forfeiture.

For the Plaintiff it was urged, that this non-payment at the day, is a present forfeiture of the counter-bond: That the Demurrer here is not good; the Defendant pleads Non damnificatus, the Plaintiff lets forth a request by him made to the Defendant, to pay the money, the which he did not pay; all this shewed by the Plaintiff, and to this the Defendant demurs in Law.

It was urged, that this non-payment at the day, is a present forfeiture of the counter-bond, and that for these reasons, (S.)

1. The Plea of Non damnificatus, implies in it a saving harmless, and he ought to have shewed how he saved him harmless.

2. The Condition by this non-payment is broken, because there is a present penalty by this given, and a loss hereby incurred on the Surety.

Like unto the Case in Littleton, in his Chapter of Conditions, where the condition is to make a feoffment, and before this performed, he takes a Wife, or doth acknowledge a Statute, this is a present breach, because a present loss and charge; this is the reason of the Warrantia Chartæ, which may be sued before questioned, as appears by Fitz. Nat. Brev. quia timet implacitari.

Haughton Justice. A Damnification will not be by a bare fear.

Dodderidge Justice. This matter is very well debated, in 18 E. 4. fol. 27, 28; before remembred: And so without any further debate, this Case was adjourned.

Termin. Hillar. 14 Jac. B. R. this Case was moved again, and the Book of 18 E. 4. and Broughtons Case, Coke 5 pars. were cited.

The Court agreed herein, that the condition being to save the Plaintiff harmless, the which the Defendant here hath not done, by his failure of payment at the day, by the which he hath put the Plaintiff in danger to be Arrested, which is a damnification unto him, and so consequently a present breach of the Condition, and a forfeiture

feiture of the Counter-Bond, and that by reason of the Defendants non-payment of the money at the day, the Plaintiff had just cause of Action upon his Counter-Bond, that the Action was well brought, the Defendants demurrer not good; and so by the Rule of the Court, Judgement was given, and so entered for the Plaintiff. Judgment for the Plaintiff, per Curiam.

*Porter Plaintiff against Chapman  
Defendant.*

**I**n a Writ of Error to reverse a Judgement given in London, in an Action upon the Case upon an Assumpsit: The Error assigned was, because two several Assumpsits were laid, the one void, the other good; a Verdict for the Plaintiff, and entire damages given by the Jury.

The Court agreed this to be a clear Error, and for this Error, by the Rule of the Court Judgement was reversed. Judgment reversed per Curiam.

*Beresford Plaintiff against Gooderidge  
Defendant.*

**I**n an Action upon the Case against the Defendant, as Executor, upon a promise made by the Testator for a Marriage Portion; upon Non assumpsit pleaded, a Verdict was found for the Plaintiff. An Action against an Executor.

It was moved in arrest of Judgement, that this Action lieth not against the Executor, for this Assumpsit of his Testator, for this matter Patrimonial the Executor shall not be charged with this at the Common Law, if it were not by Deed; and to this purpose was cited 45 E. 3. fol. 24. and that upon this difference: If one doth promise another to give him so much, if he doth marry such a one, or if he doth marry his daughter, for this he shall sue at the Common Law, and his Executors shall be liable for this after his death; otherwise it is where he assumes to give so much with his Daughter in Marriage, for this Suit shall be in the Spiritual Court, (S) in Court Christian, and not at the Common Law, and the Executor for this is not there to be charged. 1 Ro. Rep. 433.  
Cro. Jac. 404.  
1 Ro. Abr. 14.  
461. 468. 193.  
45 E. 3. f. 24.

And upon this difference are these Books, (S.) Fitz. Nat. Brev. tit. Prohibition, f. 44. A. and fol. 50. 5. in Consultation 14 E. 4. fol. 6. b. 15 E. 4. f. 32. 17 E. 4. f. 4. 19 E. 4. fol. 10. Plowdens Commentaries, fol. 305. in Sharington & Pledals Case, out of 22 E. 3. Lib. Assisar. placito 70. Fitz. tit. Prohibition, placito 2. Brook tit. Debt, placito 134. & Brook tit. Jurisdiction, placito 63. 20 E. 4. fol. 3. b. 36 & 37 H. 8. Dyer, fol. 59. Latimers Case, 45 E. 3. fol. 24. placito 30. Fitz. tit. Jurisdiction, pl. 15. & tit. Executors placito 40. In Debt he counted, how that a Covenant was had between him and the Defendant, that if he did take to Wife the Daughter of the Defendant, that then he would be bound to him in 100 l. he shewed how that he had taken her to Wife; exception there taken, because this debt was demanded upon a Covenant, touching Patrimony, the which ought to be tried in Court Christian, by the Statute of Articuli Cleri; but because he demanded the Debt upon a Deed, by force of which it became in Law to be a Covenant, it was therefore ruled maintainable; otherwise if without deed. Fitz. Nat. Br. tit. Prohibition 44. A. title Consultation. So 5 14 E. 4. f. 6. b. &c.

A President was cited in this Court, between Sanders and Estarby, in an Action upon the Case against the Executor, upon the promise of a Testator for a Marriage Portion, which was Mich. 13 Jac. B. R. entered Termin. Trin. 13 Jac. B. R. Rot. A President cited &c.



Hurban Plain-  
tiff against E-  
lyot.

after a Judgment here given for the Plaintiff, a Writ of Error was brought in the Exchequer Chamber, and the same matter there alledged for Error, as is now here moved in Arrest of Judgment; another Case was also cited to be in the Exchequer between Hurban Plaintiff against Elyot Defendant; where the promise by the Testator was, that in consideration that he married his Kinswoman, he promised to give him so much; it was held in the Exchequer, that the Executor was not to be charged with this promise of the Testator, to pay the 60 l. promised, and 10 l. quarterly, in maritagium.

47 H. 6.

For the Plaintiff it was urged by Coventry, that the Action well lyeth against the Executor, and as to the Presidents cited of Sanders and Estarbyes Case, that was here adjudged against the Executor. A Writ of Error was brought upon this Judgment, but there was no reversal of it; Only a Certificate of the Clerks was shewed, that the opinion of the Judges in the Exchequer Chamber, was contrary to the Judgment here given; but the same Judgment was not reversed. And as to the other Case cited of Elyot, this was differing from the Case here now in question; in 37 H. 6. one there said, marry such a maid, and I will give you so much; Debt lieth for this.

As to the exception taken, because in the Declaration, no Notice appears to be given of the marriage; to this it was answered, that this is not of necessity to be given; and so the difference will be between such a contract, which is made a Debt and a meer collateral promise, there if he suffer the day to pass, he shall lose it, otherwise, where it is in Case of such a contract as makes a Debt, though he suffers the day to pass, yet the Debt and duty here always remains, until the same be discharged by payment; so where a promise doth amount to make a Debt (as in this Case it doth) no notice is to be given, as it hath been adjudged; otherwise where it is for a collateral thing.

Coke 9 pars f.  
89. &c.

Haughton Justice. I do doubt, whether an Action upon the Case, lieth against the Executor, upon the Assumpsit of the Testator, for a thing or contract which makes not a Debt, upon Coke 9 pars fol. 89. 90. 91. Pinchons Case.

Dodderidge Justice. Within these three years, in this Court, there was here the like Action brought, upon payment to be made at the marriage day, and overthrown for default of notice given of the marriage day. If a man be bound to pay to another so much money at the marriage day of J. S. he ought to give notice to him of this.

The Court were clear of opinion, that here in this Case, notice ought to have been given of the Marriage-day, which was not done accordingly, and therefore the Court conceived this to be a good cause to arrest the Judgment. But yet they would not over-rule this, but gave directions to search for Presidents in this Case.

As touching the other matter. The Court was clear of opinion, that this action, as it is here brought, well lyeth against the Executor, upon the Assumpsit of the Testator.

This Case was afterwards moved again. And as to the point of notice, It was urged, that no notice is requisite to be given of the marriage, though part of the money promised, was to be paid upon the Marriage day, for that this promise makes this to be a good and a true Debt, the which still hath continuance, until it be paid.

Trin. 44 Eliz.  
B.R. &c.

And according to this, It was here adjudged, Trin. 44 Eliz. B. R. Rot. 238. between Hodges and Wareley, That in case where the matter demanded, is become to be a Debt, there no notice is to be given.

Trin. 7 Jac.  
B.R. &c.

And Trinit. 7 Jac. B. R. Rot. 795. between Brendly and Cobbe, the same Case in effect, and Judgment there given in an Action upon the Case; upon such a Promise, without any notice given. For this was held not to be requisite, being a Debt

**Debt.** In *Hodges Case*, there he assumed upon the Marriage of his Kinswoman, to pay unto him so much at the day of the Marriage, at the day he brought his Action without giving him any notice of the Marriage.

Judgment was here given for the Plaintiff.

Upon this a Writ of Error was brought in the Exchequer Chamber, and the Judgment was there affirmed.

The other President of *Brendleys Case*, 7 Jac. there also this point of Notice was questioned, and moved here in Arrest of Judgment, because no Notice was given.

As touching Notice to be given in such Cases, there will be a difference (as it was urged) where a collateral thing is to be done upon a Marriage-day, there notice ought to be given of it. But where the thing then to be performed is a due debt to the party who doth not demand this, yet notwithstanding this remains a good debt to him, and for refusal to pay this he may after have his Action, and in this Case no notice is requisite to be given.

*Haughton.* The Presidents here shewed, are the one of them upon payment to be at the day of Marriage; the second to be upon payment after Marriage, and no notice given. I am of opinion, that in this case, Judgment ought to be given for the Plaintiff, and that the want of notice given, is not material.

But in Case of a Bond for payment of money at the day of Marriage. It is to be considered, Whether notice be there requisite, to be given of the day of Marriage.

Afterwards, at another time this Case was moved, and urged for the Defendant, that this Action lyeth not against the Executor, upon the Assumpsit of the Testator, being for a thing which was impossible for the Testator himself to perform, this being for Marriage-money, to be paid upon promise after his death; here it is not debitum against the Testator, and therefore his Executor shall not be charged with it; to this it was answered; that in 36 & 37 Eliz. Judgment was here given in such a Case, before *Slades Case* now resolved. *Coke* 4 pars. 92. That an Action lieth against the Testator, and against him likewise upon an indebitatus assumpsit; here it is not, as it hath been urged, to pay after his death; but this is to be paid, tempore mortis.

*Crook Justice.* The Executor here is chargeable with this, &c.

There is a difference between a Charge, which chargeth the heir, and which chargeth the Executor. If the Testator upon a good consideration makes a promise to pay such a sum, one year after his death his Executor shall be charged with this.

The Court agreed, that the Action here well lyeth against the Defendant being an Executor for this Assumpsit of his Testator, and that no notice is here requisite to be given of the Marriage, and therefore by the Rule of the Court Judgment was given, and so entered for the Plaintiff.

Judgment for  
the Plaintiff  
per Curiam.

### *Rawlinson Plaintiff against Greeves Defendant.*

**I**n an Action of Trespass, The Case was this. (S.) A Copyholder did Surrender his Copyhold estate to the use of another. The which Surrender was presented at the next Court held for the Manor, and found by the Feoffee, and he to whose use the Surrender was made, was there in Court accepted of by the Steward, and a Copy by him granted unto him; afterwards he to whose use this Surrender was made, surrenders the same again to the use of another, who was presented

Trespass.

sented, and a Cope granted unto him, and he accepted of it as a Copehold Tenant, by the Lord.

The Questions insisted upon were 1. whether he should be, by this which is done in Court by the Steward, and by the Cope granted unto him, a perfect and compleat Copeholder, without any other act to be done unto him.

And 2. When he surrenders again to the use of another, which Surrender is also presented in Court, and a Cope granted unto him, and he accepted of for a Copehold Tenant by the Lord, whether this be not an assent in Law by the Lord to the first Surrender, and so to make that party to whose use the first Surrender was made, and presented, to be a good Copeholder, so by this enabled to make the second Surrender.

It was urged, That by all this which was thus done upon the first Surrender, by the presentment in Court, by the Homage, and by the Cope granted to him by the Steward, he was not yet a good and compleat Copeholder, without some other act to be done; a further act being requisite to be done by the Lord, to give perfection unto this Surrender, and to make him a perfect Copeholder, and this is, for the Lord to admit him; and the entry is, cepit de Domino, or Cui Dominus dat seisinam; but as it was urged, a bare surrender, and a presentment only of this shall not amount unto an admittance; for that the consent of the Lord is requisite and that of necessity, and before admittance of the Lord, he cannot be a compleat Copeholder.

It was further urged, that this acceptance of the Steward, shall not amount to make a good admittance of him, as a Copeholder, and that until he be admitted, the Land remains in the first Copeholder, who surrendered the same; and for this was cited, 12 Eliz. Dyer fol. 292. and Coke 4 pars fol. 21, 22. Browns Case, and fol. 23. Pennysfathers Case, touching a possessio fratris of a Copehold estate, before admittance, that here there ought to be an actual admittance of the Lord of the Tenant, to whose use the Surrender was made, before which he cannot be a perfect Copeholder; for when a Copeholder surrenders to the use of another, before admittance of the Lord, the Copehold Land remains in him who surrendered, and not in the Lord, he being used but as an Instrument, for the conveying of this to another, and not to take any thing hereby unto himself.

Against this it was alledged, that this Surrender here is duly made, and that according to the course, and this is afterwards presented by the homage, and accepted of by the Steward, and a Cope granted unto him, by which, the Cope of him who first did surrender (S.) the force of this is quite gone.

It was further urged, that he to whose use this Surrender was made, did afterwards surrender to the use of another, which Surrender was presented, and a Cope to him granted, and he accepted of by the Lord, as a Copehold Tenant; this was urged to be a plain assent in Law by the Lord to the first Surrender, and to prove this was cited, 46 E. 3. Fitz. title Forfeiture placito 18. and Coke 5 pars fol. 15. a. in Newcomen & Hodges Case there remembred, where a Parson doth lease his Rectorie unto his Patron for 50 years, who assigns this over; Resolved, that in this grant is included as well a Confirmation of the first grant, as a grant of this over. And so here this admittance of him to whom the second Surrender was made by the Lord, is an assent also by him unto the first Surrender; here the entry is compertum est per Curiam, that such a thing was done, (S.) that such a Surrender to the use of another was made, and this presented by the homage, per Homagium, but no express assent of the Lord; no such entry of cepit de domino nec admissus est inde tenens, nec dat seisinam, nothing more found, but a bare presentment of the Surrender, whether the subsequent Act of the Lord upon the second Surrender shall not in Judgement of Law be an assent by him unto the first Surrender.

12 Eliz. Dyer  
f. 292.  
Coke 4 pars,  
f. 21. &c.

46 E. 3. &c.  
Coke 5 pars,  
f. 15. &c.

Haughton



Haughton Justice. If this first Surrender be presented, and a fine paid by him, if this be not entered, this will trench far in the Case. It is here found, non aliter admissus.

Dodderidge Justice. If the Lord will accept of this Surrender, if this Surrender be in Court, without all question this is good. But here the same was extra Curiam, but presented in Curia, the Lord hath the same power out of Court, as he hath in Court, and here it is, acceptatur per Seneschallum.

Haughton. If a Copeholder surrenders to the use of another, and this is presented in Court, he to whose use the Surrender was made, surrenders to another, who is admitted by the Lord; afterwards the first Surrenderer surrenders to another, whether any thing doth pass by this? the first Surrender here, to the use of another, was made out of Court, and this presented in Court (S.) at the next Court, whether the Copeholder be ousted by this, or not? Whether upon this Surrender so presented in Court, with a Compertum est, without any other admittance, whether this shall be good to make this second Surrender good; or if any admittance of the first, according to the first Surrender, be here in Law, or in Facto. If not, whether he which made the first Surrender, may have the Copehold Estate again after his Surrender.

It was urged, that he should have his Copehold Estate again. For that this is but as a remembrance, or a preparation for an admittance, which ought to be subsequent, and in Facto.

It was further urged also, that the assenting of a Fine upon him, is no admittance. But if the Steward accepts a Fine of him, so assented, as of a Copeholder, this is a good admittance of him. And as touching admittances of Copeholders, It was urged, that there will be a difference between admittances of the Steward, and of the Lord himself, which may be by an implied Act: but of the Steward, this ought always to be by an express Act. Also an admittance by the Lord of a Copeholder, may be done out of Court, but by the Steward, this ought to be in Court.

It was also urged, that before admittance, according to the Surrender, the Estate in the interim, remains in him who made the Surrender, but by the admittance, to be transferred over to the other, and not to be revoked, or countermanded.

To make good the first Surrender, It was urged, that here it is not only found to be with a Compertum est, but also that he accepted of him, ut tenens, and a special entry in Court made of this, an entry in the Roll, and a Roll there made of it, and that by virtue of this Surrender, the said Copehold Estate hath been quietly enjoyed ever since, 40 Eliz. and the reason that no other admittance was of him, was because he did not agree for the Fine, to the Lord, who is but as an Instrument to convey this to the other, who when he is in, and admitted, is in only by and from him who first surrendered; and now in this case, after 18 years quiet possession, the Heir of the party who first did Surrender, would avoid this Surrender so made by his Father, and that for default of this admittance of the Lord.

Haughton. Here the Steward hath delivered to him a Copy of the Court Roll, but no admittance was of him; the point here is, whether this Presentment of the Surrender, of it self hath absolutely taken away the Interest of him who made this Surrender. If the Lord hath assented unto it, then without all question, this Interest of the first Copeholder, who thus surrendered, had been perpetually taken away from him; here he to whom the first Surrender was made, surrenders this to another, and the Lord admits him, according to this Surrender; Whether this admittance of him, by Judgment of Law, shall be said first to be an admittance of the second Surrender, according to the first Surrender, thereby to give

give him power, and so to enable him to make the second Surrender; of this I doubt.

Dodderidge. If this Surrender had been made unto the Lord himself, the Case had been then the stronger, but here the same was to the Steward, who made the Entry of it, the Entry ought to be (S) dat domino pro fine, & admittus est, and he ought to have seized of the Lord. Plowdens Commentaries, the second part, Hare & Bickleys Case. Induction to a Benefice, resembled to an admission of a Coppelholder: And so without further debate at this time, this Case was adjourned to a further time.

Term. Hill. 14  
Jac. B. R. this  
matter moved  
again.

Afterwards (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and urged, for the making good the first Surrender, that the Steward may admit. That the Estate passed from him, who made the Surrender, and nothing doch pass from the Steward, or from the Lord: That the assent of the Lord makes an admittance, which ought to be according to the Estate transferred. That the acceptance of the second Surrender, and the admittance of the party upon it by the Lord, implies (as it was urged) an assent to the first Surrender, and that after the first Surrender, the Coppelholder cannot surrender to another, the Estate being passed from him by the first Surrender.

Dodderidge. A Coppelholder surrenders his Coppelhold Estate, before admittance & Trespass is done upon the Land; the first Coppelholder, who made the Surrender, shall punish this Trespass.

Haughton agreed with him herein, that he shall not punish the Trespass, if he still continues the possession.

Mountague Chief Justice. A Coppelholder surrenders to the use of another, and his Heirs; the Steward admits him, and this to him and to the Heirs of his body. Notwithstanding this admittance, yet the Estate shall be unto him, according to the Surrender, to him, and to his Heirs. If a Trespass be done upon the Land, after the Surrender, and before admittance, he which made the Surrender, shall not have an Action of Trespass, for this Trespass, for by the Surrender, all his interest is by him given away from him.

Dodderidge. A Surrender of a Coppelhold Estate, is compared to an Induction to a Benefice, before Induction no possession, and so before admittance no possession; pays a Fine, & fecit domino fidelitatem. No possession is altered before an admittance; as touching the assent of the Lord. If a man grants a reversion to one, who before attornment grants this over to another, the tenant attorns to the second Grantee; this is not good, otherwise where it is by fine, the assent ought to be as the Surrender is, and in the same manner, and this proves, that before this, he had no lawful Estate in him, by the first Surrender.

The Court agreed in this, that he to whom, or to whose use the first Surrender was made hath no Estate at all in him before admittance.

Dodderidge. The question is, what Interest, he which made the Surrender, had in the interim, before admittance, and whether he may transferre this over to another, or not.

Mountague. Though nothing be in the party, to whose use the Surrender was made, before his admittance, yet by the Surrender, the whole Estate is out of him who made the Surrender, and by this his Surrender is passed away from him.

And so the Court doubting of this Case, and differing somewhat in opinion, they demanded sight of the Books of the Pleadings, and so this resting upon a Curia advisare vult, the same was adjourned to a further time. But the same was not moved again, but ended between the parties by mediation of friends.

Ended by a  
greement.

Harding

*Harding and others Plaintiffs, against Goseling  
Defendant.*

**I**n a Prohibition to stay proceedings in the Spiritual Court, upon a Suit there for Tithes; the Case was, That Gosnel libelled there against them, for a modus decimandi, being not paid.

The Plaintiffs suggested another modus decimandi, which suggestion they refused to receive; upon this a Prohibition prayed.

Dodderidge Justice. The modus decimandi, is as well due to the Parson, as Tithes is at the Common Law, and if the Parson do libel in the Spiritual Court for a modus decimandi, (as he may do) and another modus is there suggested, and this refused, they may there try and determine this matter touching this modus, and no cause to grant a Prohibition for this refusal; But if they do there refuse the suggestion for the modus upon this ground, because their Law and our Law do differ in the point of proof; as for default of two Witnesses, one being allowable in our Law, but not with them: In this Case a Prohibition is to be granted, but otherwise they may there as well try the modus decimandi, as the right of Tithes.

But if a Parson do libel there for Tithes in kind, and a modus is suggested, and there pleaded, the which they refuse to allow, upon this refusal a Prohibition is to be granted: But otherwise it is where the Libel is as in this Case for the modus, which they may well try, and therefore no cause to grant a Prohibition.

Haughton Justice. In this Case a Prohibition ought to be granted, otherwise in such Cases, upon every small difference alledged in the modus, they may try and determine the validity of every modus decimandi, which they cannot do by the Law; they are not to be suffered by our Law to try a modus decimandi there, but they ought to be prohibited; and therefore they proceeding to try this modus, which is determinable by our Law, and not by them in the Spiritual Court, a Prohibition ought to be granted.

Dodderidge. No Prohibition is in this Case to be granted, for there they may well try and determine this modus by their Law: The Libel being there originally for the modus; but if there be a difference in their proceedings, between their Law and our Law, as touching the probate of this modus, if proved by one Witness, the same is good by our Law, but not so with them without two Witnesses; if this be the ground of the refusal of the suggestion, then a Prohibition is to be granted, and therefore this is fit to be examined whether it rests upon this point, or not; and if it do so, then a Prohibition is to be granted, but not otherwise; if they only proceed there to try the modus, for which the Libel was, by proof this may well be there examined by them.

Croke Justice, at this time delivered no opinion at all in this Case.

By the rule of the Court, this matter was referred to a Clerk of the Court, truly to examine the difference between them in the Spiritual Court, upon the Libel there, and to certify the Court of this, and so this Case was adjourned to a further time.

Afterwards this Case being moved again.

Dodderidge. If there be a modus decimandi between the Parson and the Parsoners, and he libels in the Spiritual Court to have Tithes in kind, and the modus is suggested, they are in this case to be prohibited; but if he libels there for the modus, to have this paid unto him, (as he may do) and the other party doth suggest that he ought to have another kind of modus, but not that for which he li-

A Prohibition.  
1 Rol. R. 419.  
1 Ro. Abr. 642.  
656.  
1 Ro. Abr. 283,  
284, 293, 301,  
305, 307.



belled, here the truth of this matter shall be tried there; but if the difference between them, be touching the matter of proof of this modus, and wherein their Law and ours do differ in the manner of the proof by Witnesses, in this Case they are to be prohibited; and so is 1 R. 3. and 10 H. 7.

Also if a Parson do libel there for a modus, whereas in verity there was no modus, but only a Composition of late time between the Parson and the Parishoners to pay so much yearly for Tithes, and not otherwise: In this Case, because that our Law and their Law do differ in the point of prescription, with them ten years continuance, being a good prescription, but not so by our Law, in this Case they are to be prohibited.

Haughton. A modus decimandi is properly to be tryed and determined by the Common Law, and not by them in the Spiritual Court, for that their Law and our Law do differ in many things, as in point of proof of a modus, and in the point of Prescription.

Croke. A special modus being there libelled for, is there to be tryed; but if they differ there in a temporal matter, they are then there to be prohibited, this being triable by the Common Law.

Dodderidge. If they do there refuse to allow of the proof, allowable by our Law, and wherein they differ from us, they are then to be prohibited not to sue for Tithes there: And where there is a modus, if they refuse to pay this, the Parson may sue there for this modus, and this is to be tryed by them; but if in such a Case where there is a modus, if the Parson will libel to have his Tithes in kind, and the other shews there this modus, which they will not allow of, they are here to be prohibited, and this shall be tryed by our Law.

Haughton. There is a Custom laid in the suggestion, this they ought to hit right in all the particulars, or else they will fail; this was in a Case of Fishing, Tithes, Fish being libelled for, or the modus for the same; The Parson to have Tithes of the clear gain made thereby; if they allow 500 l. for the charges of the Woyage for Fishing, before any Tithes to be paid, by this they will make the Tithes of the Parson to be little or nothing.

The Court declares that they would see the suggestion, and therefore by the rule of the Court they were to make their suggestion, and to shew the same to the Court, as they would stand unto it; and in the mean time the Suit in the Spiritual Court to be stayed.

Nota, That 16 die Novembris, Termin. Mich. 14 Jac. Sir Edward Coke Chief Justice de B.R. was removed from his place, and 18 Novembris, Sir Henry Mountague the Kings Serjeant and Recorder of London, was sworn Chief Justice of the Kings Bench in his place.

### *Fosse Plaintiff, against Parker and others Defendants.*

Libel for  
Tithes, &c.

**B**y Libel in the Spiritual Court, for the Tithes of Beck-wool of 800 Sheep which the Defendants had cut, and converted the same to their proper use: The Defendants there answered that they used between Michaelmas and All-holland-tide, to cut the Head, Neck and Cars, to preserve their Sheep from Vermin and Flies, and so by this to make the Fleece the better, and that they were to pay the tenth Fleece at shearing time, but not to pay any of these Beck-Fleeces, being as they alledged of no value: The which Plea they there refused, and gave a sentence for the Plaintiff against them: For this cause a Prohibition was prayed.

The

The Court denyed to grant a Prohibition in this Case.

Haughton Justice. There may be much deceit used in this, as in the Case of Rakings: If purposely they will scatter Coyn, the Parson shall have Tithe of this, unless it be minus voluntarie; so here, if they cut great Flæces which will yield profit, the Parson is to have the Tithe of this.

Dodderidge Justice. The suggestion here alledged is, because he paid the tenth Flæce at shearing time; for this to be discharged of payment of Tithe of the Beck-flæces, and that in consideration of this, the Parson to have the tenth Flæce after; this is due to the Parson Jure Divino: they make too long Beck-hearings, and upon this colour they use to hear all the Shoulders also, and so by this to spoil the other Flæce: If the Parson be to have the tenth Flæce of the Back, he ought also to have the tenth Flæce of the Beck, and no reason for the contrary.

Croke Justice. If they cut this Beck-flæce, and convert this to their proper use, they ought of this to pay Tithe to the Parson.

It was then urged, that if such abuse was in the cutting of the Beck-flæces, this ought to come on the other side to shew this to be so, as in the Case of Rakings.

The whole Court against this, and denyed at this time to grant a Prohibition, for that their answer in the Spiritual Court, was no ways sufficient to debar the Parson of his Tithe of these Beck-flæces.

Afterwards this was moved again, and the suggestion appearing to be, that for <sup>A Prohibition,</sup> this, they used to wind up the other Flæces at their own charge, so for this cause a <sup>&c.</sup> Prohibition was granted by the Court.

### The Wife of *Hungate* Plaintiff, against *Philips* a Constable, in *Comitat' Eborum*, Defendant.

**I**n an Appeal, Coventry for the Defendant demands, 1. Oyer of the Writ of Appeal. Appeal, and of the return of this which was read in Court: Then he demanded Oyer of the Capias, and of the return of this which was read in Court: Then he demanded Oyer of the Capias, with Proclamations, and of the return of this.

To this, George Croke for the Plaintiff made answer, (S) Quod vicecomes non misit breve.

Coventry. To this the non-return of the Sheriff of this, shall not take away the benefit of the Appellæ by this, but at the day the party appearing gratis, the Plaintiff ought to declare against him.

Curia. As to this, vicecomes non misit breve, you cannot now demand Oyer of the Capias, with Proclamations when it is here recorded in Court, Quod vicecomes non misit breve, for it is vain for you to demand Oyer of that which is not.

### *Page* Plaintiff, against *Davis* Defendant.

**I**n a Prohibition to the Spiritual Court, upon a Suit there for a Legacy, the <sup>A Prohibition,</sup> Defendant there did suggest the Custom of London, of forraign Attachments for Debt, and shews that such a Legacy was given by, &c. and the same attached for Debt, according to the Custom of London.

Prohibition  
denied, &c.

The Court clear of opinion, that Legacies are not within this custom of London, of foreign Attachments; that this Custom doth not extend unto Legacies, for it ought to be a Debt certain, or not within this Custom; for that a Custom cannot be to attach a Legacy, which is not a certain Debt, nor yet any duty until all the Debts are paid, and for this cause a Prohibition was denyed per Curiam.

*Samuel Melitine a Stranger Plaintiff, against Hall  
Defendant.*

Debt.  
1 Ro. Rep. 423.

**I**N an Action of Debt upon a Bond; the Case was this, The Defendant was indebted by two several Obligations unto the Plaintiff, conditioned for the payment of 200 l. to him, at his House in Black-Fryers, in Parochia Sanctæ Annæ, in Warda de Farrington, 10 l. of which was paid; the Plaintiff in his Declaration sets forth the payment of the 10 l. unto him in part, and brought this his Action for the residue of the said 200 l. which was to be paid at his Mansion House; upon Nil debet pleaded, a Verdict was given for the Plaintiff.

It was moved for the Defendant, in arrest of Judgment, that the Declaration was not good.

First, Because it is not shewed by the Plaintiff upon which Bond this 10 l. was paid, which ought to have been specified; for which omission the Declaration is not good, and for this 3 H. 6. fol. 44. was cited.

Secondly, Because there is no place laid where the payment was to be made, being only said to be at his Mansion House; and that the Venire facias was not well awarded, being de Parochia Sanctæ Annæ, in Warda de Farrington.

Haughton Justice. 200 l. was due to the Plaintiff upon both the Bonds; he sets forth that he had received 10 l. in part thereof, it is no prejudice at all to the Defendant, of which of these sums this 10 l. shall be part; this payment was good, and the Action well brought for the residue.

Croke Justice agreed with him herein, for this is for the benefit of the Defendant, to have this his payment of the ten pound in part, to be thus acknowledged by the Plaintiff.

Dodderidge Justice. The Defendant was here indebted to the Plaintiff upon two several Obligations; several in respect of the Obligations, but he may joyn the whole in one Action; he hath alledged the payment of ten pound to him in part, and it is not material at all upon which Obligation this ten pound was paid, it is part of the Sum, and of the Debt to be paid, and no inconvenience can arise by this; the Issue was, Whether the Bond was paid, or not, the Declaration here is good without shewing upon which Bond the same ten pound was paid.

As to the Venire facias, he was bound to pay this at his Mansion House, this may be paid at any place.

Judgment for  
the Plaintiff  
per Curiam.

The Court over-ruled the Exceptions taken to the Declaration, and so by the rule of the Court Judgment was given for the Plaintiff.

Sir



Sir George Reynel Plaintiff, against I. S. a Prisoner in the Marshalse, in his Custody, Defendant.

**T**he Court was moved on the behalf of Sir George Reynel, Marshal of the Court, against one of his Prisoners who had very much misbehaved himself, had offered to make an escape, and had endangered the killing of one of his Servants; that he had spent in following of him 10 l. and therefore the Court was moved to have him fined for this, and that he might have recompence for this his 10 l. so disbursed and laid out.

Motion to have a Prisoner fined.

Croke Justice. To fine him for this, we will not do it, unless that the Presidents of this Court, in such a Case will warrant this, the which we will first see, and well consider of: But you may keep him in arcta Custodia, (S) in Irons; you may also indict him for these misdemeanors, and so by this way to have him fined, but not otherwise.

Sir George Reynel being present in Court made answer, That by the Presidents of the Court he may well be fined without any Indictment.

Dodderidge Justice, & Curia. This is but your suggestion, upon which we will not proceed in such a manner without seeing the Presidents of the Court, for the allowance of this; but you may keep him in arcta Custodia: And this was all the Court would do herein without any other directions given.

Crawley Plaintiff, against Marrow Defendant.

**I**n an Action of Trespass and Ejectment, for Land in Brigstock, in Comitatus Salop, upon Non culp. pleaded, the Jury found a special Verdict; upon which the Case appeared to be this, (S) Tenant in tail acknowledged a Recognizance of 1000 l. and dies; A Scire facias was brought against the Issue in tail, who hanging this Scire facias, made a Lease for years of the Land in question to the Defendant, and pleads to the Scire facias, that he had riens per descent of Fee-simple from his Father, and that he was not the terre Tenant of the Land, all which was found against him, (S) That he was terre Tenant of the Feehold, and that he had Land by descent from him in Fee-simple, all which was put in Issue; and hanging this, he made the Lease to the Defendant: Judgment was given against the Issue in tail, that the Land should be liable unto this Recognizance, the Lease was made before Judgment to the Defendant; the Defendant being the Lessee pleads all this matter, and in the special Verdict this is all found: The Plaintiffs title was under this Recognizance, and the Judgment given against the Issue in tail: The Defendants title under this Lease for years made unto him, by the Issue in tail.

Ejectione firma. Bridg. 64.

1 Ro. Rep. 424.

443.

1 Ro. Abr. 876.

The Points here moved and insisted upon were these, (S)

1. Whether the Issue be bound by this, or not.
2. If he be bound, then whether the Defendant, his Lessee for years be bound, and whether he may falsifie in this Case by the Statute of 21 H. 8. cap. 15. and Stat. of 21 H. 8. cap. 15. enjoy his Lease against the Judgment given in the Scire facias, against the Issue in tail his Lessor.

It was urged by Hedley and Coventry for the Plaintiff, that although this special Verdict finds him to be Tenant in tail, yet by 37 H. 6. fol. 21. in a Scire facias

facias against the Issue in tail; if he have a release to plead, and will not plead the same, by this his Laches, he hath lost the advantage of this; the same reason here in this Case.

Obj. It may be objected as it was urged, that here the Scire facias was not for the Land it self, but for a collateral thing out of the Land, (S) to recover the 1000 l. upon the Statute acknowledged by the Tenant in tail.

Resp. The difference will be, (as it was urged) where Tenant in tail grants a Rent by Fine at the Common Law, this is void against the Issue; another difference may also be, if it were a Judgment against Tenant in tail, this shall not bind the Issue in tail; but otherwise it is, where the same is by Action tryed, as here in this Case it was.

In an Action of Debt brought against the Heir upon an Obligation, if he appears and pleads that he hath riens in Fee-simple by descent, and upon this Issue the Jury finds against him, that he hath Land in Fee-simple by descent, this Land shall now be bound by this Judgment.

If a Disseisor, as it was urged, doth acknowledge a Statute, the Disseisee enters.

In a Scire facias against the Disseisee, who pleads that he hath not any Land that was the Conusors, jour del brief purchase, if this be found against him, the Land is by this bound: This last Verdict in this Action, as it was urged, is not contrary to the first Verdict in the Scire facias, for here the Jury do find, that his Ancestor was Tenant in tail, and died seised, and it may be that he suffered a Recovery afterwards, and so died seised in Fee-simple; for he might suffer a Recovery, thereby to cut off the Intail, after the Recognizance acknowledged, the which was so acknowledged to Sir Sohn Whitbrook, 11 Eliz.

To this it was answered for the Defendant, by Bridgeinan, that the Issue in tail was not bound by this; this must be agreed, that Tenant in tail cannot charge the Land, if he do by his death, this is then discharged, and all charges on the Land by him.

28 Assisar.  
placito 38. &c.

26 Assisar. placito 38. Quintins Assise: If the Issue in tail doth confirm a Rent before granted by Tenant in tail, this is void; but if the Issue in tail doth enfeof another, the Feoffee shall hold this charged, and so is 14 Assisar. placito 3. such a grant is void by his death.

Here in this Case, as it was urged, the Lessee of the Issue in tail shall not be bound, by this mispleading of the Issue in tail himself, nor yet subject to this charge. If the Tenant in a præcipe aliens pendant le brief, yet he remains Tenant, and the Attinee shall not be received, as appears by 12 Assisar. placito 41. the reason, a prejudice by this may be to the Demandant; here in this Case there can be no prejudice to the Demandant in the Scire facias, for this at the time of the descent, was discharged of this Recognizance, and became only chargeable by the Judgment against the Issue in tail; the Lessee here shall be discharged for his term, and therefore as it was urged, he shall be here received to falsifie, by the Statute of 21 H. 8. cap. 15. a termor by this Statute shall be received to falsifie upon a feigned recovery; and so here in this Case, forisif a Man hanging the Writ against him, makes a Lease for years, if his Lessee shall not falsifie, then every such Lessee may be triced.

Obj. It hath been objected, that it appears by the date of the Lease, that the Issue in tail made this Lease, hanging the Writ of Scire facias brought against him, and that therefore the Defendant his Lessee shall not falsifie.

Resp. To this it may be answered; that then this shall be very mischievous unto such Lessees.

Haughton Justice. By this way any one may trice his Lessee.

Dodderidge Justice. And on the other part, any one may then avoid a lawful recovery.

And

And so this Case was adjourned to another time for further Argument herein.

Afterwards this Case was moved again, and urged for the Plaintiff, that the Defendant being Lessee of the Issue in tail, shall not be received to falsifie this recovery had against the Issue in tail his Lessor; also he came unto this Lease after the Verdict given, and so the Issue in tail himself is bound by the Judgment in the Scire facias against him, and therefore his Lessee here shall also be bound: The Recognizance acknowledged by the Issue in tail, is void by his death, but when this is prosecuted against the Issue by the Scire facias, who pleads riens per discent in Fee-simple, and this is found against him, he hath now no other remedy to aid himself but by an Attaint: It was his own Laches that he did not give the Writ of Inail in evidence to the Jury, and therefore by the Judgment against him, this Land is now extendable, and the Defendant his Lessee shall not be in any better Case than himself.

As to the Statute of 21 H. 8. cap. 15. It was urged that the Defendant here being Lessee of the Issue in tail, shall not be received by this Statute to falsifie this recovery, and that for these two Reasons.

1. This Statute extends to Recoveries had by Cobin, the preamble of the Statute being named Recoveries suffered; the purview of the Statute is, That Lessees for years shall falsifie such Recoveries for their terms only, but here is no such recovery by Cobin; and this Statute doth not give such a falsifying of a recovery by the Lessee, as is had against his Lessor, upon an Action tryed, as here in this Case, and for which he hath his Attaint for his present remedy.

2. The Statute is, That a termor shall falsifie in such a manner, as a Tenant of the Free-hold shall, or may do by the course of the Common Law, &c. but here the Tenant of the Free-hold could not falsifie, no more shall his Lessee here by this Statute.

Montague Chief Justice. If this Recovery here hath bound the Estate, how then can this Lessee be received to falsifie and plead this; 7 H. 7. the Law shall not be an Instrument of discent; here the Issue in tail is bound, and so shall the Defendant his Lessee be.

Haughton. This very Land was not charged by the Scire facias brought against the Issue in tail, which was but only, Quare executionem habere non debeat, to which he pleads riens per discent, from the Conusor in Fee-simple; and so the Issue was, Whether this Land was Fee-simple Land, or not, and by this consequence, being so found, this very Land is now by this made to be liable to this Recognizance, and that ex consequente, but not by the Scire facias, and so this Land became to be charged by the Verdict and Judgment, with this Recognizance; and this before the Lease made, and the same became chargeable by the faux Plea of the Issue in tail: And so the difference is when the Action is brought for the Land it self in particular, and when it is (as in this Case here) only to shew cause, Quare executionem habere non debeat.

Dodderidge. Shall the Issue in tail here say after this Verdict, that he is Tenant in tail, certainly he shall not, neither shall he be remitted upon a Discontinuance after this Verdict; if the Oath of 12 Men be false, this is to be so proved by 24 this to stand in full force till the same be disproved; after a point tryed in a real Action, never shall he be received to falsifie in the point tryed; and so here in this Case, clearly the Defendant being Lessee for years of the Issue in tail, shall not here falsifie for his term; the Land by the Judgment is bound, and his Estate liable to this.

Montague, 10 H. 6. The Issue in tail shall not falsifie in a point that is tryed by Action.

The whole Court clear of opinion, because this was after Verdict, the Lessee here shall not be received to falsifie for his term.

After



Judgment for  
the Plaintiff,  
per Curiam.

Afterwards at another time it was clearly argued by the whole Court, that the Lessee for years shall here not falsifie, and so the same was pronounced by Mountague Chief Justice, and accordingly by the Rule of the Court, Judgment was given for the Plaintiff.

*Smale Plaintiff, against Boyer Defendant.*

Action on the  
Case upon a  
promise a-  
gainst an Ex-  
ecutor.

**I**n an Action upon the Case, brought against the Defendant as Executor of, &c. upon the assumpsit of his Testator, the same being, That if he married his Daughter, he promised to give him so much with her, as he had given to any one of his Daughters.

The Plaintiff laid in his Declaration, that he had given so much to one, and so much to another of his Daughters; lays the Parriage had in his life time, that he requested payment of this, which was not paid, and for this cause the Action brought against the Defendant his Executor.

The Court clear of opinion, that the Action well lieth.

The point moved and insisted upon was this, (S) That the Verdict being given for the Defendant upon an insufficient Declaration, the Plaintiff excepting against his own Declaration for insufficiency, (which proved to be so) whether in this Case the Defendant shall have costs for his vexation, by the Statute of 23 H. 8. cap. 15. or not.

Haughton Justice. The Statute of 4 Jac. cap. 3. doth not extend unto this Case, for by this Statute the Defendant shall have Costs, as the Plaintiff should have had if he had recovered, but here the Declaration being insufficient, the Plaintiff could not have his Costs; but now the question is, Whether the Defendant shall have Costs by the Statute of 23 H. 8. cap. 15. which Statute saith, That if any Verdict shall be given in an Action upon the Case against the Plaintiff, and for the Defendant, that then the Defendant shall have his costs for his vexation; and here this was in an Action upon the Case, and a Verdict given for the Defendant, so that this Statute is clearly against the Plaintiff; but here in this Case the Declaration proves insufficient, Whether now the Defendant shall have his Costs.

Grymstones Case was cited, Trin. 40 Eliz. B. R. that in such a Case it was ruled he should not have his Costs.

Other Presidents cited e contra, that he should have his Costs.

Haughton. Grymstones Case cited that he should not have his Costs, and that this Case was in an Action upon the Case.

But on the other side, and upon this Statute of 23 H. 8. the Case in 29 H. 8. Dyer, fol. 32. placito 5 & 6. was cited: In an Action upon the Case, the Jury coming to give up their Verdict, and the Plaintiff being called became non-suit, by reason whereof the Defendant by the Statute of 23 H. 8. had Judgment to recover his Costs.

Afterwards the Record was removed by Writ of Error in B. R. by the Plaintiff, hanging which, the Defendant brought an Action of Debt in the Court of C. B. upon a new Original, and the Action held maintainable; there held, that though the Record be reversed upon the Writ of Error, yet the Plaintiff in the Action of Debt, shall have his Costs, for the wrong and vexation by him sustained by the first Suit brought against him; so in this Case the Defendant here is to have his Costs for his vexation, though the Plaintiffs Declaration be insufficient.

Dodderidge Justice. We will see your Presidents, where in such a Case as this is, Costs were given and allowed to the Defendant.

As for the other precedents cited, where Costs were not given, they may have passed sub silentio, and the matter not insisted upon.

The Court seemed to be of Opinion, that the Defendant ought to have his costs, upon the Statute of 23 H. 8. though the Declaration be insufficient, but the Court desired to see the Precedents cited.

*Leuknor Plaintiff, against Godman Defendant.*

Entred Termin. Trin. 14 Jac. B. R.

Rot. 41.

**I**N an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the Declaration was not good; and for this the case was, the Plaintiff in his Declaration sets forth, that there was a Communication between the Father of the Plaintiff and the Defendant, who said unto him, that Taylor did steal the Mare of J. S. and thy son was consenting unto it, and a partaker with him therein. Action on the Case for words.

It was urged, that these words, as they are laid in this Declaration are not actionable: The words spoken to the Plaintiff being, Thy Son was consenting to it, and partaker with him, but doth not aver, as he ought to have done in this Case, (as it was urged) that his Father had no more Sons but only this, who was the Plaintiff.

For the Plaintiff it was urged, that the words, as they are laid, are well actionable, and for to warrant this, these Cases were cited, 38 Eliz. B. R. Bedfords Case: An Action upon the Case for words, being (S.) I was robbed, and thou wert privy to it, adjudged that the Action well did lie. 38 Eliz. B. R. &c.

15 Eliz. Dyer fol. 317. Hawley against Sydnam, He is infected of the robbery and murder lately committed, and smells of the Murder; adjudged that the Action lieth for the words infected.

Another Case was urged, lately adjudged here for words, being, The Defendants in the Star-Chamber, were they that murdered Thomas Farrer; adjudged here the words to be actionable, and this Case afterwards affirmed in a Writ of Error.

The whole Court agreed this Case to be so, for here, the Defendants comprehended all the Defendants there.

As for the averment urged here to have been made, that the Plaintiffs Father had then no more Son than the Plaintiff, such an averment here ought not to be, for that the Law doth not presume a plurality.

Dodderidge Justice. If one saith to a Woman, Thy Husband did murder such an one, or hath stolen a Horse: It hath been in this Case adjudged, that the Action lieth without any such averment; the reason of this is apparent, because she can have but one Husband, and therefore here is certainty sufficient.

But it is not so here in this principal Case, for that he may have more Sons, and therefore for the maintenance of this his Action, he ought of necessity to have had such an averment, (S) That his Father, to whom the words were spoken, had no more Sons but only the Plaintiff, and without this averment, clearly the Action lieth not.

The whole Court agreed with him herein, and that without such an averment (which in this Case is wanting) the Action upon the Case for these words will not lie: And for this omission of this averment the declaration here is not good, and Judgment, &c. therefore the rule of the Court was, Quod querens nil capiat per billam.

*Parry Plaintiff against Parry Defendant.*

An Action of  
Debt.  
1 Ro.Rep.395.

Term. Trin.  
14 Jac. B. R.  
&c.

**I**N an Action of debt brought by an Executor, & profert hic in Curia literas testamentarias; the Defendant by Plea sheweth, that the party which was dead, died intestate, and that Letters of Administration were granted unto him, and takes a Travers, absque hoc, that the Plaintiff is Executor; Whether this be a good Travers or not was the question.

This Case was first moved, Term. Trin. 14 Jac. B. R. and then urged, that this Travers is not good; but if a Travers here is to be taken, he ought then to have traversed that he made no such Will.

Coke Chief Justice. The Travers is not good clearly, for that he may be Executor of his own wrong, and so this Travers is not good, by the Book of 7 E. 4. No Travers at all is to be taken, where he brings an Action as Executor.

The whole Court agreed with him herein, that the Travers was not good, and therefore by the rule of the Court, a day was then given him to put in a peremptory Plea, as he would stand unto it.

Afterwards, (S.) in this Term of Mich. 14 Jac. this matter was moved again upon the Travers, and urged that this Travers was not good; and to warrant this, the Books of 10 H. 6. fol. 26. 9 E. 4. fol. 33. & 4 H. 7. fol. 13. were cited.

10 H. 6. f. 26.  
&c.

Dodderidge Justice. In 9 E. 4. fol. 33. there is a confessing and avoiding by a refusal.

The whole Court clear of opinion, that the Travers here is not good, but very absurd; but if any Travers at all was here to be taken, it should have been absque hoc quod constituit eum executorem, but the Books do question it, whether in such a Case any Travers ought to be; but the Travers here is not good, and so by the rule of the Court Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff.

*Havergil Plaintiff against Hare Defendant.*

Entred Termin. Hillar. 13 Jac. B. R.  
Rot. 868.

Ejectione  
firmæ.

**I**N an Action of Trespass and Ejectment, upon Non culp. pleaded, the Jury found a special Verdict, upon which Verdict the Case appeared to be this, (S.) One Parlour was seised of certain Land in Fee-simple, and being so seised, he granted a Rent charge of 20 l. per annum out of this Land unto one Odour, his Heirs and Assigns to be paid at two Feasts by equal portions, with a clause of distress, if behind by twenty days; and for further assurance of this, he did covenant upon request, to levy a Fine unto one Hill and Ewer and to the Heirs of one of them, which should be to the uses expressed in certain Indentures, (and no use is there expressed) but in this manner.

And



And further Covenants, that then, and from thence forth, if the said rent shall be behind in part, or in whole, and no distress upon the land, or if any distress, if a Rescous be made or any pound breach, or any Replevin sued; that then it should be lawful for the Grantor, his Heirs or Assigns into the said Land to enter, and the same to retain until he be satisfied of the rent behind. Hill dies before any request made to levy the Fine. Odour the Grantor assigns this rent over unto Woodward, his Heirs and Assigns, who sells this unto William Filher the Lessor of the Plaintiff and to his Heirs and Assigns with all the benefits, and privileges, which he was any way to have.

Afterwards 10 l. of the rent was behind, 11 Jac. afterwards the Fine was levied Trin. Term. 12 Jac. to the said uses, and no more behind, the assignor of the rent for the rent before the fine levied, which not paid; after the fine he came to distrain, and upon a Replevin sued, he enters into the Land for the whole rent by force of the said use, and for the trial of his title he makes a Lease for years unto the Plaintiff; and then the Jury conclude, that if the Lessor have a good title to make this Lease, then they do find for the Plaintiff, and small damages, for the damages in the Replevin; and if the Lessor have no good title, then they find for the Defendant.

This case by the Judges, was said to be a case of very great consequence, the same trenching unto all assurances to be made, which case was long and several times argued at the Bar, and afterwards by all the four Judges.

It was in this case urged for the Defendant, that no use could here arise upon this Fine, because that one of the parties, to whom the Fine was to be levied died, before any request made to have the Fine levied.

Notwithstanding this, It was by Henry Finch urged for the Plaintiff, that without question the use shall well arise. For if one covenants to levy a Fine before such a day, although that the Fine levied differs from the Indenture, in time, place, in the quantity of the acres, or in the person which occupied this, yet when the Fine is levied, it shall be intended to be to the same uses in the Indenture, as appears in the Lord Cromwells Case, Coke 2 pars fol. 69. in Downmans case, Coke 9 pars fol. 1. and in the Earl of Rutlands case, Coke 5 pars fol. 25. so here in this case, although one of the persons first specified, is not named, (S) Hill, because he was dead, yet the Fine shall be intended to be to the same uses.

Coke 2 pars  
fol. 69. &c.

To this purpose a case was cited, Pasch. 3. Jac. 5. Barnard Whetstone, and Withipoles case, Swansted against Elyot; being the parties in this Court where the Covenant was, to levy a Fine, before such a day to certain uses, the Fine bears date before the Indenture. Resolved here, that this ought to be taken to be to the use in the Indenture: if the same be averred to be so, and so given in evidence.

Pasch. 3 Jac.  
B. R. &c.

But it was also resolved in Whetstones case, that if the Jury do find this generally, then it shall not be intended to be to the same uses, (S) where the Fine is first, and then the Indenture of uses, which Fine shall be levied to the same uses; here the Jury in this case have found expressly, that this Fine is to the uses in the Indenture; and therefore not to be questioned.

The chief matter considerable in this case is, whether Filher the bargainer, by his entry hath gained unto himself such an estate in the Land, as will warrant the Lease for years made by him to the Plaintiff; so that he upon an ouster may maintain an Ejectione firmæ. It was strongly urged, that by this his entry, he hath gained a good and a lawful estate, so that he may well make of this a Lease for years. If no Fine were in the case, but the Indenture only purporting so much; yet he hath shewed sufficient cause before to warrant the making of this estate for years; for it is, (S) if the rent be behind, and no distress upon the Land, or if a Replevin be brought, then Filher the bargainer, to enter into the Land, and this to hold until the rent of 20 l. be paid unto him, and here half a years rent was be-

hind, by this entry such an Estate is given unto him, as it was urged, that of this he might well make a Lease for years.

If a man doth Covenant, and grant that J. S. shall have his Land until 10 l. be lewyed; or if he doth Covenant and grant that he shall have his Land, this shall amount unto a Lease of the Land, until the 5 l. be paid.

5 H. 7. f. 1. A man doth licence another to hold his Land, this shall amount unto a Lease.

27 H. 8. fol. 5. One doth covenant that J. S. shall have his House, or his Cow, by this the property is presently altered from him to J. S. and there by Fitzherbert, if one doth Covenant that J. S. shall have his Lease, this shall be good to him.

1 Mar. f. 96. &c.

1 Mar. Dyer 96. Seymors Case, a man doth covenant that another shall have his Land, by this he shall have it, and there a use may rise by such a Covenant.

8 E. 1. Fitz. tit. Assise, pl. 412. It is there admitted, that if one covenants that J. S. shall have his Land for so many years, this is a good Lease for so many years as are named,

5 Jac. B.R. &c.

5 Jac. B. R. between Turker and Squire, A man doth covenant to suffer J. S. to enjoy his Land for five years, this resolved to be no Lease for years, being but to suffer, which rests only in his Will; but here it is clear, that being coupled with the word Grant, this makes a good Lease for years.

37 H. 8. &c.

37 H. 8. Brooks Cases, fol. 69. placito 309. Brook tit. Leases, placito 60. That convenit & concessit, shall make a good Lease, so that by these words, as it was urged, Fisher the Assignee hath a good and a fixed Estate, and not barely at Will; the Covenant being that he shall hold the Land until the arrearages be paid, which here were 10 l. so that as it was urged, he hath here such a fixed Estate, of which he may make a Lease for years: For he had but only an Estate at Will, or a bare perception of the profits, such a one could not make a Lease; here he hath a certain Lease.

14 H. 8. f. 14.

2 Mar. &c.

2 & 3 Mar. &c.

14 H. 8. fol. 14. by Brudnel, Land given to one till 20 l. be lewyed, this is a good Lease; but this was not fully determined, until 2 & 3 Ph. & Mar. 2 Mariae Brook Leases, pl. 67. Brooks Cases fol. 101. pl. 462. by Bromley and others; a Lease made to J. S. till 10 l. be paid, and without livery, this but a Lease at Will for the incertainty.

But 3 Mariae Brooks Cases, fol. 102. placito 468. Brook tit. Leases pl. 67. It was there held by all, If one lease Land to J. S. till he hath lewyed 20 l. that this is a good Lease, notwithstanding the incertainty.

Coke 4 pars fol. 81. Sir Andrew Corbets Case touching this matter: It was then further urged, That if this Covenant will not aid him, then 2. The Fine then lewyed to the use of, &c. until 10 l. lewyed; this will make this good; The Case for this, being a Fine is lewyed to the use of J. S. till 10 l. lewyed; this is all one, as it was urged with the Case of Statute-Merchant.

27 H. 8. &c.

This use here is well executed, by the Statute of 27 H. 8. c. 10. of uses, 27 H. 8. 5. upon the matter, it is this very case now in question, after the Statute of uses: An Indenture of Covenant, if he do not marry the Daughter of J. S. that he shall hold the Land, until 100 l. be lewyed; there held that this is such an Estate as his Executor shall have here by this Fine lewyed to the use, &c.

Fisher, as it was urged, hath a good and a fixed Estate, out of which he may derive another Estate, determinable upon the payment of the rent behind.

It was urged for the Defendant, that the clause in the Indenture is, that if the rent of 20 l. be behind, but here the rent of 10 l. is behind, and therefore he cannot enter into the Land.

To this it was alledged for the Plaintiff, that if the 20 l. or any part of it, be behind, this was the true intent and meaning of the Indenture, and the naming of 20 l. is but a designation of this.

Dodderidge.

Dodderidge Justice. As to the finding of 10 l. only behind, this is not good, for he ought to have specified, if behind in all or in part, he then to have the Land; this is not here so done.

Haughton Justice differed herein from him in opinion, because if the Rent for half a year be behind, the Assise ought to be brought for the whole Rent, De redditu prædicto, here it ought to have such a construction, that if the rent be behind at any time, when this ought to be paid, that then, &c. for then the Rent of twenty pound is behind, although not twenty pound of the rent, and so this is good as it is found.

It was then urged further for the Defendant, that the 10 l. behind, and for the which he entered into the Land, this was so behind, before that the Fine was levied and so he cannot enter into the Land for this 10 l. which was behind, before the Fine was levied.

Dodderidge. If this be so, this is a gall in the Case.

And so this Case was adjourned for further Argument.

Afterwards (S) Termin. Pasch. 16 Jac. B. R. this Case was moved again, and debated. Term. Pasch.  
16 Jac. B.R.  
&c.

Haughton, Before the use is here to arise, the Rent ought to be behind, and a Replevin brought; the Law respects initium actionis, where there are divers Circumstances.

And so without further debate at this time, this Case rested upon a Curia advisare vult.

Afterwards, (S.) Term. Trin. 16 Jac. B. R. this Case was then moved again, and adjourned over for the Judges to deliver their opinions herein. Term. Trin. 16  
Jac. B.R. &c.

Afterwards, (S.) Term. Mich. 16 Jac. B. R. this Case was moved again. And for the Plaintiff Term. Mich. 16  
Jac. B.R. &c.

Coke 2 pars fol. 92. & 93. Bingham's Case was cited, where to the perfection of consummation of a thing, two accidents are requisite, and the one happens in the time of one, and the other in the time of another, in such a Case, neither the one nor the other shall take benefit of this, because that both did not fall in the time of any of them, and both are requisite to the consummation of the thing: As if Lord and Tenant is by certain Rent, and the Tenant cesse per un an. and after the Lord grants away his Seigniorie; and after the Tenant cesse pur autre an, in this Case none of them shall take benefit of this cesse.

Haughton Justice. Judgment in this Case ought to be given for the Defendant; divers questions have been moved in this Case, whether this which hath happened shall rebound to the benefit of Fisher the Assignee; it shall not; divers Objections made against Fisher, and ruled to be none: The question, Whether Fisher here shall take benefit of the non-payment of the Rent before the Fine, two questions are considerable herein.

1. The manner of the rising of this use: This is plainly directed in the Indenture, that the same shall be to the use of Odour, his Heires and Assigns; this is so by the Indenture of 8 Jac. to be to the like uses, but not to the same uses; like unto this, where the King grants unto a new Corporation eadem libertates, which London hath, these shall be such, but not the same; the intention of this special verdict shall be to the use of Fletcher: Parlour, who here levied the Fine, might have made new uses; here is one use limited upon a contingency, upon a good consideration, a good interest given in the use upon a contingent, therefore the heir shall not be in Ward, here in this Case, there is no right of the use before the Fine comes.

Bingham's Case hath been objected by the other side, the Case there of the Cessavit, the reason of that Case much differs from the Case here in question; Cases there put, which in shew make against me, but upon due examination they do not; the



the Case there put of the Wardship, and of the reversion granted; there he shall have the Wardship in respect of a former right which he had, but it is no so here in this Case, where there is no former Right, but a new Right by the Fine.

2 & 3 Maria, Dyer fol. 130. accordingly exprets in point, in case of Wardship, where the commencement of the Interest to the Wardship, was by the death of the Father, before the Seignior granted; here in this case the rent was arrear to Fisher, and by him demanded, but this was all before the Fine, he could not demand this by force of the condition, before the Fine levied, nor yet by reason of any former right that he had; here it is, if it shall happen the rent to be behind, this not to be intended, that which was behind before the Fine, so that for this Rent thus behind before the Fine levied Fisher the Assignee had no right to enter for the same, nor yet any ways intitled, thereby to be enabled to make a Lease for the Plaintiff, so that the Plaintiff here can have no good title under Fisher his Lessee, and therefore Judgment ought to be given against him, and for the Defendant.

2. Dodderidge Justice agreed with him, that Judgment ought to be given for the Defendant.

In this Case some questions have been moved, which have been by the Judges over-ruled.

1. The first question, whether upon the 10 l. rent behind, the use shall arise; this is very clear, that it shall well arise, the Covenant being, that if the 20 l. or any part of it shall be behind.

2. Another point moved, Whether these contingent benefits may be assigned over or not: This the Court also agreed, that these may well be assigned over, because they are annexed unto an Estate, and to an Interest, and so these are well assignable.

3. Another point moved, (S.) What benefit the Assignee here shall have; this the Court hath likewise resolved, that the Assignee shall have the same benefit, as his Grantor should have had.

4. Another point moved, Whether the Assignee, by his entry for the non-payment of the rent, hath such a possession, as that thereof he may make a Lease for years for trial of his title.

This the Court also resolved, that he hath such an Estate, as that he may make a Lease for years, and that he hath not only by this a bare occupation, but also, the absolute possession, and of which he may well make a Lease for years; and so is the Book of 27 H. 8. fol. 5. that by this he hath such a possession, of which he may make a Lease.

The next and great question here is, the Rent was due and behind before the Fine levied, until the Fine was levied, the Estate still remained in ParLOUR, when the Fine comes afterward to be levied, Whether the Assignee shall now come to have the use of the Land to arise unto him, by reason of a thing which happened before the Fine was levied, which was the 10 l. rent then behind.

As touching this, it shall not, neither can he be for this default has having before he was intitled to enter into the Land, nor by this use can he be any ways interested in the Land, as to make a Lease thereof, and so the Lease not good, and Judgment ought to be given against him, as this case here is.

But for the use, to arise for a Default after the Fine levied, this may well be.

The best Argument that can be made for such new Cases, is to be drawn out of the reason of the original Contract it self.

The first Reason may be drawn out of the Words of the Indenture, being these, (S.)

1. That

1. That a Fine shall be levied, and then after to the use &c. when uses arise out of a Fine, this to be after the Fine levied.

As for Contingencies hapning after the Fine levied, they reach unto the Assigné very well, and of these he shall have benefit.

A second Reason, for that Parlour did not part with this Rent presently: The intention was, that these Conusées should stand seised of this contingent use.

A third Reason: Here it was agreed, that the Fine being levied, should have relation unto uses in a former Indenture, of things which have their continuance and being, but not of other new things which happen in the interim.

The Cases put in Bingham's Case, are upon another reason, and do not match with our present Case.

Coke 2 pars, The Lord Cromwell and Andrews Case, this very Case in effect, and with such Covenants as are here in this Case; there an Abbotsdon falls void before the Fine, afterwards the Fine is levied, the Assigné of the Pannoz, with all the profits, shall not have this Presentment; there the Covenant was to levy a Fine to the uses in the Indenture; there these Points resolved. 1. That the Provisoer makes a Condition. 2. That the same should be to the first uses, being all upon one contract, the Condition not destroyed. 3. Touching the breach of the Condition, the Case is there put of the Abbotsdon, falling void before the Fine, as there it was of the Abbotsdon; so here of this Rent behind, before the Fine, is as a Slip fallen from the Tree, which the Assigné here shall not have, and so no cause to distrain for this, nor any title to enter and make the Lease to the Plaintiff, so that the title of the Plaintiff, and of his Lessors failing, Judgment ought to be given for the Defendant.

Coke 2 pars, &c.

3. Crook Justice. That in this Case Judgment ought to be given for the Plaintiff.

Four questions have been moved in this case. 1. Whether 10 l. were behind, or 20 l. 2. Whether Fisher the Assigné shall have benefit of the condition. 3. If he shall, then whether he hath such an Estate in the Land, of which he may make a Lease for years; these are all of them resolved for Fisher the Assigné.

The fourth and great Point, the Rent was behind, 11 Jac. before the Fine levied; the Fine was afterwards levied 12 Jac. the Distress for the Rent taken 13 Jac. after the Fine levied, Whether Fisher the Assigné shall have advantage of this failure of payment of Rent before the Fine; this he shall have.

As touching this, we are to see and to examine what is the cause of this forfeiture here; here the Rent was granted in manner as before, and then with the Covenant; that if it be behind at any time, in all or in part, it could not be taken where was none to be had; then the remedy provided for the same, (S) in this manner. 1. If no Distress. 2. If a Distress and a Rescous. 3. If a pound breach: Or 4. If a Replevin be brought upon a Distress taken, these are cause for him then to have the Land as a gage, quousque, The Rent here was behind, before the Fine levied.

Obj. And therefore it hath been objected, that the Assigné is not to have benefit of this, that they are verba de futuro, if it shall happen.

Resp. As to this, words are to be taken to bear such a sense, (S.) If it shall happen to be behind, that is as much as to say, quodocunque acciderit, whensoever the same shall happen to be behind.

It hath been here again further objected, that these arrerages before the Fine levied, are as a Slip, or Fruit fallen from the Tree, the which the Assigné cannot have; this is not so.

Resp. The difference will be, between the Recovery of Land and of Rent: If a Feoffment be made of Land, afterwards arrerages are demanded, and denied, for this he shall have an Assise, the same being a Disseisin; so is Littleton in

Littleton chap. Rents, f. 57. &c.

his Chapter of Rents, fol. 53. placito 238. 9 Affisar. placito 13. 8 H. 6. f. 11. Brook tit. Affise placito 69. here this is no Slip, but the same is parcel of the Inheritance granted, 10 l. here behind before the Fine levied, and 10 l. after the Fine: the Distress was for the 20 l. and a Replevin brought, for this he had just cause to enter.

This hath been agreed, and that procul dubio, if rent be behind after the Fine levied, he might enter; and here in this Case, 10 l. of the rent was behind before the Fine levied, and 10 l. after the Fine; here in this Case, transit terra cum onere, into whose hands soever the Land comes; here 10 l. of the rent was behind in the time of Parlour, who dyed, and Fisher distrained his Heir for this, and a Rescous made, for this the Land is forfeited, transit cum onere the Land, the Heir subject to the forfeiture, and so the second Feoffment; a great difference there will be, where the rent still continues in one hand, parcel of the real Inheritance, and where not; this is not like to the grant of a Reversion, where death happens before Attornment, to perfect the Grant; here Fisher the Assignee had good cause to enter, and to make the Lease to the Plaintiff, having good title so to do, and so Judgment ought to be given for the Plaintiff.

Mountague Chief Justice agreed herein with him, that Judgment in this case ought to be given for the Plaintiff.

1. The intent of the parties appears here by the Indenture of Covenants: Judicis officium, ut res ita tempora rerum, by the Indenture of Covenants, 20 l. granted, the fine to be levied, uses to be expressed by the Indenture; further, that if the same were behind, to distrain; if a Rescous, a pound Breach, or a Replevin brought then to re-enter and to retain, quousque, all these to concur, or no use to rise; this use to rise by reason of the Covenant to Odour the first Grant; we agree all for the time, (S.) The Rent was granted in 8 Jac. and the Covenants, the Assignment 9 Jac. 10 l. Rent arrear, 11 Jac. the Fine levied, 12 Jac. the Distress and Replevin, 13 Jac. lay all together, and the use well riseth unto Odour.

Reasons for this. 1. That in this Fine the Covenant comprised, which is with Odour.

6 R. 2. Fitz. tit. &c.

2. By the Rule of Law, a general Covenant directs the special uses of a Fine, the special operation of these by the general Covenant, and according to the intent of the parties, and this is proved by 6 R. 2. Fitz. tit. Estoppel, placito 2. A Feoffment to two and their Heirs by Word, a Fine to be levied, which is to them, and to the Heirs of one of them, this shall be to the Heirs of both of them, which Case is put, Coke 2. pars fol. 74. B. in the Lord Cromwells Case, there it is said, that the precedent Feoffment shall rule and direct the subsequent Fine, and preserve the joint Estate in them of Fee-simple against the express limitation of the Fine, and the Fine shall be ruled and directed according to the precedent agreement and Estate made by the parties.

Coke 5 pars, fol. 55. &c.

In Knights Case, Coke 5. pars fol. 55. a Lease made of divers Houses in Clarkenwell, rendering the yearly rent of 5 l. 10 s. 11 d. (S) for one House 3 l. 11 d. for another House 20 s. and for the other Houses, the residue of the Rent of 5 l. 10 s. 11 d. with condition, if it be behind in part or in all, at any of the Feasts, that then &c. this there resolved to be one entire Rent; Times different make no difference, if nothing happens in the mean time to cross it; as in Case of a bargain and sale, and before Inrolment a Fine is levied to him, afterwards the Dred is Inrolled, he now takes by the Fine; and if this should be otherwise, all Assurances might be shaken.

The Law neither sees, nor regards any time, but the time of the first agreement, notwithstanding divers assurances be in differing times, and all but to perfect one assurance; and by construction of Law, they shall all be said to be made at one and the same time, otherwise you may shake all assurances.

Put



But it hath been objected, how will you have this Land bound, when it is conveyed away before.

This may be answered by the Case of 16 E. 3. Brook tit. age, placito 51. put <sup>16 E. 3. Brook</sup> Coke 1 pars, fol. 98. b. in Shelleys Case: If R. S. hath a Seignioz by descent, <sup>tit. &c.</sup> and afterwards a Tenancy elcheats, then a Son is born; in this Case the Son shall enter upon him; for though the Tenancy first vested in him, and was never in the Father; yet for that the Original Cause, (S) the Seignioz was in the Father, therefore the Son shall enter upon the Uncle: To the like purpose is the Case in Plowden, f. 284. in Chapman and Daltons Case, where a Covenant was made <sup>Plowden, fol. 284. &c.</sup> with Chapman, that he should make a Lease for years unto him, before the Lease made Chapman died, the Lease was made to his Executors, so that the term first began in the Executors; yet in regard the Covenant made to the Testator, was the cause of making the Estate to the Executors, for this cause the term was affixed in the hands of the Executors, as well as if the same had been made to the Testator himself.

As to the Case before remembred in 3 Marix, Dyer, f. 130. and put in Binghams Case, Coke 2 pars, f. 94. and Mich. 24 E. 3. put in Dyer, the Case of the Wardship, there remoto impedimento: Compare this with our Case here, the Fine levied, Rent behind, a Distress taken, no use as yet ariseth, but by the Replevin sued, then the use ariseth; and in the eye of Law, all this now hath relation to the first and original agreement: The use here still remains in the first Man, till the Replevin sued; this doth then awaken the use, as it is in Shelleys Case before remembred upon the Recovery.

Another ground is also taken in Chudleighs Case, Coke 1 pars, fol. 137. That <sup>Coke 1 pars, f. 137. &c.</sup> the Execution of all things Executory still hath respect unto the original Act, and this appears to be so in the Countee de Rutlands Case, Coke 5 pars, fol. 25, 26. <sup>Coke 5 pars, fol. 25. &c.</sup> and that variance in time shall never destroy the original agreement between the parties, if no new mean agreement can be proved to be between them, but the use shall be according to the first Indentures.

The Case before remembred of the Abbowson cannot be denyed, for there this being fallen, was lodged and settled, nothing there to interrupt the same; but it is not so here in this Case, for when the use here ariseth, it is all now ab initio, upon the first agreement, and as if it had been all then perfected; the Law always hath respect to the original act and agreement, and will judge according to that, to this purpose is the Case in 33 Assisar. placito 7. where a Servant hath a purpose to kill his Master, for the better colouring of it, he goeth out of his Service, and then kills him; resolved there, this to be petty Treason, because he now acted this, which he intended to do before, when he was in his Service, and therefore resolved, that this Action should now have relation to his first intention, and so to be petty Treason in him.

It hath been then objected, that then and from thenceforth the use to arise, and that by this there is an exclusion of the former, the use not to arise before; this not so, vide for this, Coke 5 pars, fol. 19, 20. in Borastons Case, touching such a contingent limitation; here in this Case now in question, the contingency happening, this doth awaken the use, and then the same shall arise, so that here is a sufficient demonstration when this use shall arise to the Grantor, and to his Assignor, (S) upon the Distress taken, and a Replevin brought for the same, and all this shall now have relation unto the first original Agreement; so that Fisher the Assignor, in this Case, after the fine levied, had just cause to distrain for the Rent behind, and upon the Replevin brought by the first agreement, upon the Indenture of Covenants, the use did then arise unto him, and thereby he was well entitled to enter, and to make a Lease for years to the Plaintiff, which being ousted by the Defendant, had good cause to bring his Ejectione firmæ, having a good title under Fisher the

Assignee by vertue of his Lease, and so Judgment ought to be given for the Plaintiff, and against the Defendant.

*Curia*, divided  
two against  
two.

Nota, That in this Case as touching the chief point, the Judges were in this divided, (S) two against two, (S.)

Haughton & Dodderidge for the Defendant, and Croke and Mountague Chief Justice for the Plaintiff.

Nota. In an Action upon the Case upon a promise, where a certain request is to be laid, and where not.

By Mountague Chief Justice, where the request makes the Debt, there a time certain ought to be laid of the request made: But otherwise it is where there is a good Debt before, and a request only to be made for the payment of it, upon a promise, there it is sufficient to lay a request generally without any time, and this is good.

The whole Court agreed with him herein.

### Payn Plaintiff, against Selby Defendant.

An Action up-  
on the Case for  
a promise.  
1 Ro.Rep.423.  
1 Ro.Abr.570.

**I**n an Action upon the Case upon an Assumpsit, for two several promises; The one upon a promise to give one so much for a Horse, the other for Pony lent; Judgment given for the Plaintiff upon a Demurrer, and upon a Writ of Enquiry, the Jury gave entire damages; This moved in Arrest of Judgment.

It was urged for the Plaintiff, that these entire damages were well given by the Jury, and so is the common course of the Court, as it was alledged.

22 Eliz. Dyer,  
&c.

For the Defendant it was urged, that here the Action is brought by an Administration, and it is alledged, that Administration was committed unto him by the Bishop of, &c. and doth not say, loci illius ordinarius; and also that the giving of entire damages is not good, this being upon a Demurrer, and a Writ of Enquiry, and not upon a Verdict; for this was cited, 22 Eliz. Dyer, fol. 370. Cliffords Case, Ejectione Custodie terrar, & heredis, and entire damages given, this not good; and according to this is Moor and Bedels Case put.

Coke 10 pars, fol. 130. in Osborns Case, this being not like an Action upon the Case for several words spoken at one time, some of them actionable, some not, and entire damages given, this shall be for the words which are actionable, not for the other, as it was urged.

Pasch. 22 Eliz.  
B.R. &c.

For the Plaintiff it was alledged, That as to the granting of the Letters of Administration, it is alledged that they were granted by the Arch-Bishop, who was the Metropolitan, and so the Administration not void, but voidable by sentence, and so is Vere & Jefferis Case, Pasch. 22 Eliz. B.R. cited, Coke 5 pars, fol. 30. in Princes Case, and that entire damages here are well given for this, 18 H. 8. fol. 1. in waste, in three several rooms, and damages entire given, and good.

Croke Justice. He ought to have damages for all, ergo for part.

Dodderidge Justice. Here two things are joyned of one and the same nature, and therefore damages ought to be given joynly: But in a Declaration for several things, there to set down several sums.

Judgment for  
the Plaintiff,  
&c.

The whole Court agreed with him herein, and that entire damages here were well given, and therefore by the rule of the Court, Judgment was given for the Plaintiff.

*Davenport the Executor of Davenport Plaintiff,  
against Wood Defendant.*

**I**N an Action upon the Case for a promise, brought by an Executor, against an Executor of an Executor, upon the promise made by the Testator, for the payment of Money lent unto him; Rich. Wood borrowed the Money, and promised to pay the same. An Action upon the case for a promise.

It was urged that this is not the general Case of an *indebitatus assumpsit*, but the promise is special, and the request special, limited to the Testator, or to his Executors.

Croke Justice. It is here implied that he was to pay this upon request, being that which the Law here requires; if no request be made, by the omission of this, he is not to lose his Debt, the loan here is prior ordine, but by the Law they are both of them simul tempore, the request made, the Money to be paid; but if he doth not make any request, the Debt by this is not to be lost, for his Executor may well make the request.

As to the Objection made, being here the Executor of an Executor, this is not material, the Action well lieth against him, *licetque etiam, ad hoc requisitus*, to pay this, &c. the second *licetque etiam* omitted, yet the request being here made to the first Man who made the promise, and also to his Executor, this is good, *quod curia concessit*.

Dodderidge Justice. If he had said, *Licet postea requisitus*, without any day mentioned, yet this is good, and so it shall be here in this Case.

Houghton Justice. Here he declares that having lent Money, and such a day, *indebitatus* for Wares, & sic *indebitatus assumpsit*, to pay the Money, here it is *indebitatus existit*, for Money lent, and doth not say, *ad tunc & ibidem*, *assumpsit solvere*, he ought to say so, or & sic *indebitatus existens assumpsit super se solvere*.

But here in this principal Case, It was in consideratione inde super se *assumpsit*, *ad tunc & ibidem solvere*, this is good.

The whole Court agreed with him herein.

Croke. It hath been here adjudged, if Money be lent to one, who promiseth to pay this upon request to I. S. who dies before any request made, yet he shall have it; for the Money shall be paid to his Executors.

An Objection was then made, because entire damages were here given.

This was held good by the Court, notwithstanding this Objection; and so in an Action of Trespass, for two Trespasses and Damages entire given, this is good.

The Clerks being demanded by the Court, they all made answer and said, That so is the usual course of the Court in such Cases upon such several promises as here there were; two promises and entire damages given, that this is good, and they are not here to sever the damages, but where part is found for the Plaintiff, and part for the Defendant.

And so by the rule of the Court in this principal Case, Judgment was given for the Plaintiff. Judgment for the Plaintiff.



Sir John Sydnam Plaintiff, against May  
Defendant.

Entred Termin. Mich. 13 Jac. B. R.  
Rot. 347.

Action upon  
the Case for  
words.

Cro Jac. 407.

1 Ro. Rep. 427.

2 Rol. Ab. 717,

718.

1 Rol. Abr. 48,

49.

Hob. 180.

6 E. 6. &c.

**I**n an Action upon the Case for scandalous words, the Defendant denies the speaking of the words, and takes a travers, absq; hoc, that he spake the words, &c. the Jury found a special Verdict, they found the words to be these spoken by the Defendant, (S) I think in my Conscience if Sir John Sydnam might have his will, he would kill all the true Subjects of England, and the King too; and he is a maintainer of Papistry, and of rebellious Persons.

It was urged for the Plaintiff that these words are actionable, 6 E. 6. Dyer, Kemp will be a Bankrupt within these two days, actionable.

28 H. 8. Dyer, I will abide by it, that Russel was and is a false Thief, actionable; These words in this Case as it was urged, are words of scandal and aggravation: If he had said so in the affirmative, they had been Actionable, and here these words do tant amount, as if he had expressly said so.

29 Eliz. &c.

29 Eliz. between Skite and Morgan, an Action upon the Case for these words, (S) He is a maintainer of Pirates, and held actionable, and that it shall be intended in Case of Piracy.

Sir Henry Lea, & Pennystones Case, for these words, (S) Sir Henry Lea is a maintainer of Thieves, actionable.

9 Jac. B.R. Beresford & Treshams Case, Thou dost speak Treason, ruled that the Action well lay, for that Os demonstrat, quod cor ruminat. As to the entire damages given, urged that this is good, if part of the words be actionable, and part not, and the words found, the Plaintiff to have his Judgment.

For the Defendant it was urged that the words are not actionable.

Pasch. 44 Eliz. Fountain & Grymes Case, Thou are a Rebel, not actionable.

Mich. 35 & 36  
&c.

Mich. 35 & 36 Eliz. Perpoints Case, My Master put me away because I would not be a Papist, not actionable.

Trinity 40 Eliz. Allen and Atons Case, Coke 4 pars, he gave his Champion counsel to kill me; purpose, intents and thoughts, are not actionable.

Mich. 43, 44 Eliz. Royal and Virtues Case, If my Lord had done him right, he had been hanged, not actionable, because conditional words.

1. Croke Justice. The words laid in the Declaration are these, (S) If Sir John Sydnam might have his will, he would kill all the true Subjects of England, and the King too, and he is a maintainer of Papistry, and rebellious Persons. The Defendant here takes a Travers, absque hoc, that he spake the words as they are laid in the Declaration. The Jury do find that he spake the words in the Declaration; but they do further add unto them these precedent words, which they likewise find that he did also then speak, (S) I think in my Conscience if Sir John Sydnam might have his will, &c. whether by these words so added, there shall be such a variance between the Declaration and the Verdict, so that the Plaintiff cannot have his Judgment; this is a great question in this Case. If there be no such material variance, then the Plaintiff to have his Judgment.

Thoughts are free till they be clothed with words, and then they are not free, sermo est animi index, the Tongue is the Organon of the Heart, mentiri est contra mentem ire. I think in my Conscience this is idem per idem, this is but an assever

asseveration, which amounts unto an affirmation. I think in my Conscience this is all one as if he had said so in fact. Here the omitting of these words in the Declaration, (S) I think in my Conscience is no material variance, being but Circumstances, and this adding of these words by the Jury, doth not detract any thing from the Declaration. And so the words as they are laid are actionable, and the Declaration good; the variance between the words laid in the Declaration and the words found by the Jury is not material, and so Judgment ought to be given for the Plaintiff.

2. Dodderidge Justice. In this Case we are to consider these particulars. (S) 1. These words as they are laid in the Declaration. 2. The words as they are found by the Jury in the special Verdict. 3. Touching the conclusion of the Verdict.

1. The words as they are laid in the Declaration, (S) If Sir John Sydnam might have his will. To extenuate these words, (If he may have his will,) The will of Man is uncertain, and none knows the will of Man. The other words, He will kill the King; matter upon a future act, As to say, such a Man being a Merchant will be a Bankrupt within two days, these words are scandalous, because they take away from him his credit, as well for the future time, as for the present; these words thus spoken draw Men from dealing with him. If one saith that I.S. will Rob I.B. within such a time; for if he saith, that he make preparation for to do it; these words are scandalous quia præbent occasionem ruinæ, although nemini ruinam. The Law doth not only maintain and preserve the life and possession of a Man, but also his good Name; here the words are, will do such a thing, being words de futuro; a thing that none knows. All moral Virtues and Vices, are in the will of Man, and from the will, they come into the intention, and so by this a thing is made good or ill. Bracton, Out of a wicked will, no good proceeds; and so the words as they are laid in the Declaration are scandalous.

2. As to the Verdict, and herein it is to be considered, whether by this Verdict the first words are qualified by the adding of more words, or whether by this there is any diminution of the words. If any diminution be, yet if he did speak words as imported Scandal, there the Court shall judge upon them; as to the words added by the Verdict, if these words so added do diminish and extenuate the matter, this may alter the Case, but when the words so added, do diminish nothing at all, but rather aggravate the matter; as 1. thought, and then speech afterwards, and all this doth arise out of an ill thought, and that with these degrees, (S) 1. privately, secondly publickly, and thirdly with denunciation; here the words added in this Verdict, do not diminish, but encrease the scandal, proceeding out of a wicked Conscience. None can judge of the Conscience of another until he declare this, by words uttered by him; he ought to rule his Tongue; this doth not suit with his Conscience, he ought not to speak ill of any Man, the referring of this to his Conscience doth not at all diminish, but very much aggravate the matter, the words themselves proceeding from an ill Fountain, and from an ill Root.

3. As to the conclusion of the Verdict, the Jury do refer the matter, they find him culpable of the words in the Declaration; this is true, these they do find, and other words also to be spoken by him, (but not laid in the Declaration,) this variance makes no alteration in the Case, the words spoken and found are scandalous, and actionable, for which the Plaintiff had just cause of Action; and so Judgment ought to be given for him.

3. Haughton Justice. That in this Case Judgment ought to be given for the Defendant. But in this Case I will neither excuse, nor yet justify the Defendant. The words are scandalous, as they are laid in the Declaration, although they are in the future time, and for the Plaintiff; these words in the Declaration are sufficient for the maintenance of his Action. The uncertainty of the will doth not alter nor diminish the matter; the words being in the future time. The Case cited at the Bar

6 E. 6. Dyer  
fol. 72. Kemps  
Case.

Bar of 6 E. 6. Dyer fol. 72. Will' Kempe will be a Bankrupt within these two days adj. actionable; this Case moves me to be of this opinion, for this is a discredit to him, and all will think so of him; and so here. If he had his will, none knows whether he would have done this or not; here it is to be presumed that he knew something, that he had a wicked will, and therefore in this I do agree with the rest for the Plaintiff, and this upon the reason given in Hext and Yeomans Case, Coke 4 pars, fol. 15. b. For my ground in Allerton, Hext seeks my life; and if I could find John Silver I do not doubt but within two days to Arrest Hext for suspicion of Felony. For the later words adjudged that the Action well did lie, because that for suspicion of Felony, he shall be imprisoned, and his Life drawn into question.

But here the matter which moves me to doubt, and to be of opinion against the Plaintiff, is upon the words in the Declaration, which are not found by this Verdict; for this being an Action upon the Case for words spoken, the Jury here have not found these words which are laid in the Declaration; the words being laid in the Declaration in the affirmative. (S) If he might have his will, absolutely these words to be proved by the Verdict, and Damages to be given in respect that he hath directly said so; and the Jury have found in this manner, (S) That he said I think in my Conscience, that if, &c. and so this is not in the affirmative, as the same is laid in the Declaration; and I am of this opinion, not because these words are as an excuse, or by way of extenuation of the former words, for they are not so, but because the Jury have not found the words affirmatively, as they are here laid in the Declaration; and for this cause only I am against the Plaintiff, for the words, as in the Declaration laid to be spoken by him affirmatively in the Verdict, they are found to be spoken in another form, (S) that he said, I think in my Conscience, that if, &c. and so the words as they are here laid in the Declaration, are not found by this Verdict; and therefore the Plaintiff here cannot have his Judgment. If an Action upon the Case be brought for words, some of which words are actionable, and some others not, Judgment shall yet be given for the Plaintiff, and Damages in such a Case given generally, shall be taken and intended to be given for those words only which are actionable, and not for the other. I hold that for the first words here, if found as they are laid in the Declaration, an Action well lieth for them, and the Plaintiff to have his Judgment, but not so as they are here found by this Verdict; and therefore as this Case is, and upon this Verdict thus found, Judgment ought to be given for the Defendant.

Croke. Because the Jury have found the words themselves which are laid to be spoken, and more by way addition, this shall not take away the Plaintiffs Action, for these additional words do nothing at all diminish or lessen the other, and so the Plaintiff to have his Judgment.

Dodderidge. If the words were such, that such a one is a Bankrupt; the Jury do find that he said, that he would be a Bankrupt; here the Plaintiff shall not have Judgment, because the Jury doth not find the words in the Declaration, one being in the present time laid; the other, the finding of the Jury, in the future time, and yet both are actionable. But when the same words without any alteration, are found by the Jury, but yet with an addition of some other words, which do not diminish (if they did diminish) then the Plaintiff not to have his Judgment; here the words added and found by the Jury, do not withdraw from, but add by way of aggravation, they add an ill thought to a corrupt tongue; these additional words do not diminish any thing from the former words laid in the Declaration, the Jury only finds further that he spake these word, as he thought in his Conscience; so that here is no Diminution from the former words; but the Jury do find all the words in the Declaration, and more. In the Case before remembered, the Plaintiff could not have his Judgment, because the Declaration was in the present time, but when the same words in the Declaration, without any alteration



ration are found, which do make no diminution, but do only add ill thoughts to ill words; therefore the Plaintiff to have his Judgment.

Haughton. If a Thief be at the Bar, to be arraigned, and a Witness comes in and saith of him, I think in my Conscience that he stole the Horse, for which he was questioned; this is no affirmation that he did so.

Dodderidge. When the life of a Man is in question, and one Witness saith, I think he did the fact, in this I do agree that this makes nothing against him. But fama, fides & oculus, are tender things, and not to be compared to the Witness of one, upon the life of a Man, the same and credit of a Man is more tender, and words which will bear Action, will not take away the life of a Man.

We do all of us agree, that the words in the Declaration are well actionable. But we do differ only upon this which is found in this Verdict, by way of addition.

Curia. We will confer more of this amongst our selves, and if we can be all of one mind, the Plaintiff then shall have his Judgment. But the best way is to have the Defendant to agree, and to submit himself to Sir John Sydnam the Plaintiff; and so for the better effecting hereof, the Court advising the Defendant so to do; this Case was adjourned upon a Curia advisare vult, to a further time.

Afterwards this Case was moved again for the Judgment of the Court, there being no end made between the parties.

Haughton. It hath been agreed, that if the words laid in the Declaration, and the words found by the Jury are differing, that then this is not good.

Dodderidge. It hath been agreed, that the words laid in the Declaration here will well bear an Action, and 2. It hath been also agreed, that if the words found in the Verdict, had all been in the Declaration, that then it would be for the Plaintiff. It is now to be considered, whether these words found in the Verdict more than are in the Declaration, hath altered the sense of the slander; as to this I think clearly it hath not, for here by these words added in the Verdict, to be also spoken by him, he shews, that his thought was as ill as his words spoken.

Croke. Take these words any way as you will, either single or divided, and the words will well bear an Action.

Dodderidge. If the words in the Verdict, which are added, were such, (S) I am fully resolved, that if, &c. would this make any alteration? It would not clearly.

Mountague Chief Justice agreed with them herein. All is here found by the Judgment for Verdict, which he did speak, & aliquid amplius than is laid by the Plaintiff in his Declaration; but this which is found more, doth aggravate, and nothing at all alter the matter, and therefore by the Rule of the Court, Judgment was given for the Plaintiff. the Plaintiff,  
per Curiam.

### *Sminke Plaintiff, against Barker Defendant.*

**I**n an Action of Debt, the Defendant had day given unto him to wage his Law, Debt. 1 Ro. Rep. 430.  
and at the day, Richardson Serjeant moved the Court, that the Defendant was sick of a burning Fever, and for this cause moved the Court for another day for him to come and to wage his Law, and did offer to make all this good by an Affidavit.

The Court refused to receive this, but advised him to plead to the Country, and so he did.

*Motteram Plaintiff, against Motteram  
Defendant.*

A Prohibition.  
1 Rol. R. 426.  
1 Ro. Abr. 341,  
343.  
1 Ro. Abr. 298.  
300.

Hillar. 7 Jac.  
The Case of  
the Church-  
wardens.

**I**n a Prohibition, upon a Suit in the Spiritual Court, the Case was this, (S) A Suit was in the Spiritual Court for Defamation, by the Wife of the party, a Sentence there given, and costs, pro expensis litis, the Husband did release these costs, which they would not there allow of, upon a suggestion here that the Husband was divorced *Causa Adulterij*. A Prohibition was prayed.

Against the Prohibition, a Case was cited, Hillar. 7 Jac. where a Suit was in the Ecclesiastical Court, by two Church-wardens, for not repairing of the Church; one of them did release, the which release being there pleaded and disallowed, a Prohibition was prayed, but afterwards a Consultation was granted because that this Court is not to judge of this, which properly belongs unto them.

Object. The reason objected, because the release was not there by them allowed of, and that this is matter of injustice.

Resp. In answer to this, this may be there tried by Appeal.

Also there may be good cause for them to disallow of the release, and no injustice done by this. Also this release in this Case was made after Sentence there given; and if at the Common Law, such a release should be made after Judgment given, this would not be good. If a Writ of Error be brought here, upon a Judgment given in the C.B. and for Error, shews a release made after Judgment, this is no Error to reverse the Judgment. Here the divorce was a *mensa & thoro*, and also from all matrimonial Duties.

38 Eliz. &c.

For the Prohibition, It was urged, and much enforced, that this release by the Husband was good, the Suit being in the Ecclesiastical Court, for Defamation, Sentence there given, the Wife divorced a *mensa & thoro*, which doth not dissolve *vinculum maritagij*, but that this notwithstanding, they may come together again when they will; and such a divorce, is no bar of Dower. And this is not like to the Case before remembred of the Church-wardens, which must be agreed to be so. 38 Eliz. B. R. between Melham & Winnes. It was here ruled, that a Gift of the Goods of the Parish, made by the Church-wardens, is not good, without the assent of the Side-men, and the Vestery, and if by the Vestery the same is good, this being then in manner as a By-Law, here costs are given, and the Husband doth release them, if they will there give Sentence, notwithstanding this release, and against the same, they ought to be prohibited; this release here (as it was urged) being a full Bar of the effect of the Sentence; this matter pleaded there before the Court of Audience, and the release there shewed, and therefore they are not to execute this Sentence against the release.

Trin. 44 Eliz.  
B. R. &c.

Dodderidge Justice. The Case which was between Totrey and Stevens, Trin. 44 Eliz. B. R. Rot. 865. where Baron and Feme were divorced for Adultery on the part of the Wife, there was a Suit also for a Legacy, which is a good Case, and Suits with this Case here in question, if it be looked into.

Haughton Justice. In Case of a Suit for a Legacy, the Husband is for to pursue this, and therefore his release here may be good; but here in this Case, the matter in question is for Slandering of the Wife, and this is personal to the Wife, and the determination of this, is left unto them there, and if by their Law, in such a Case, the release of the Husband is not good, thereby to deprive the Wife of her costs, being depending upon the Original, (S) the Defamation; We have nothing here to do with this, for to correct their Law; and therefore they are not in this Case by us to be prohibited.

Dodderidge

Dodderidge. They there only restore the party, to her good name, in Case of Defamation, as here in this Case; and this doth very much differ from the Case of a Legacy, the point here only is, the husband and wife are divorced, causa Adulterij, the Wife sue in the Ecclesiastical Court for Defamation, and there recovers, and costs are given, the which the Husband did release, whether this release thus made by the Husband, shall bar the Wife of her costs. And if they will not allow of this release there, whether a Prohibition shall be granted or not.

The whole Court clear of opinion, that no Prohibition in this Case is to be granted. And so by the whole Court in this Case a Prohibition was denied.

Prohibition  
denied per  
Curiam.

*Frost Plaintiff against Eyre Defendant.*

**I**n an Action upon the Case for scandalous words, upon Non culp. pleaded a verdict was given for the Plaintiff. It was moved in Arrest of Judgment for the Defendant, that the words spoken, and laid in the Declaration, are not actionable. The words were these spoken by the Defendant, to the Plaintiff. (S.) Thou hast forged Writings, for which thou shouldst lose thy ears.

Action on the  
Case for words.  
V. 3 Leon. 231  
C. 313. Cro. El.  
166. 1 Ro. Rep.  
431. 1 Ro. Abr.  
66.

Whether these are actionable or not, was the Question?

The Plaintiff being an Attourney at Law, and so the words do touch him in his Profession.

It was urged for the Plaintiff, that these words are scandalous, and well Actionable, and Venders Case was remembred, which was for these words. (S.) Thou hast forged my Fathers hand, whereby thou hast received my Rent, adjudged, that these words were actionable; these words here in this Case are spoken, to bring him in danger of the Statutes of Perjury and of Forgery.

Venders Case.

1. Crook Justice. For these words (S.) Thou art a Cut-throat, no Action lyeth for these words, here they are to be taken in mitiore sensu. But here in this Case, couple the first words with the later, and ex precedentibus & consequentibus, it will be very hard against the Defendant. In this Case the words are scandalous, and the Action of the Case for these words, by the Plaintiff well maintainable.

2. Haughton Justice. It is very clear, that the former words will not bear any Action; for these words do not charge him with forgery, and then these later words being only explanatory of the former words, will not bear an Action, where the former will not. As if one saith to another, Thou hast stolen the Lead off my house, or my Tyles, for which thou shouldst be hanged, these words are not actionable. Sometimes, where the first words are actionable, and the subsequent explanatory words do qualify the former, and so do make them not actionable; As in the Case here, where one said of another, Thou art a Traitor, for thou didst affirm that the Kings Coyne was fallen a Noble in the Pound, and ruled, that for these words, being all laid together, no Action did lie.

Dodderidge Justice. The Action here brought by the Plaintiff, for these words thus spoken of him will not lie, for that it is not certain what writings he did mean, and they may be frivolous writings, and for which he ought not to be called in question, and therefore not actionable: And if it be so, then the later words here will not add this, they will not aggravate: If he would Indict him, the same ought to be, quia falsa fabricavit facta, and not quia fabricavit false writings; and here an innuendo will not help this, as to say afterwards, Innuendo Obligationem, and this may here be done out of the Indicting of another: It may be a frivolous letter, and of no moment, and so it may well be understood, and therefore not actionable.



Crook. If one saith to another, Thou hast stolen, No Action lieth for these words; but if he do add these words, (S.) for which thou shouldst be hanged, an Action upon the Case then well lieth; so here, Thou hast forged Writings, no Action lieth for these words; but add these other words, (S.) for which thou shouldst lose thy ears, these words then will bear an Action; as in the other Case, (S) for which thou shouldst be hanged.

Dodderidge. The word stealing imports Felony and Larceny, and so they are scandalous, for if it be but for 6 d. he shall for this have punishment; but here the words are, Thou didst make forged Writings, not shewing what they were, and so not actionable.

Crook. I agree this to be so, if you add not these words to the former, (S) for which thou shouldst lose thy ears, without these latter words, the other are not actionable.

Haughton. For to make forged Writings, is not punishable, but the publication of them; but because it is not shewed what these Writings were, this makes the doubt.

And so this matter rested upon a Curia advisare vult, and the same adjourned to a further time.

Afterwards this Case was moved again, and debated.

Mountague Chief Justice. It is not here laid, that the Plaintiff was an Attorney, but a Solicitor: These words, as they are laid, will well bear an Action: In generalibus, words shall be taken in mitiore sensu, but not so in particularibus, sensus verborum ex causa dicendi: For one to say of another, Thou hast made forged Writings, no Action lieth for these words; but if he consjoyns the latter part with the former, these do very much enforce the other.

Coke 4. pars,  
f. 12.

To this purpose is the Lord Cromwells Case, Coke 4. pars fol. 12. It is no matter you like not me, for you like not any of the Kings Subjects.

Browns Case there put, Thou hast burnt my Barn adjoining to my house, these words are actionable, words are to be taken in communi sensu.

Birchleys Case, Coke 4. fol. 16. in this Court, being an Attorney, Thou art a corrupt man, an Action lieth for these words, for they touched him in his Profession; so here in this case the words are actionable, and the Action brought by the Plaintiff for these words do well lie.

Crook. It is here laid that the Plaintiff was a Practitioner, a Solicitor, and a Steward of a Mannor, these latter words here will enforce the Action: If he had laid that he was an Attorney, clearly then the words would be actionable, but it is laid here, that he was Senescallus, and so the words actionable, because he is a publick person; the preceding words here are to receive construction by the words subsequent: Burnt my Barn, Innuendo, full of Corn not actionable; but if the words, Burnt my Barn full of Corn, for these words an Action well lieth; here the words are spoken to the Plaintiff being Steward of a Mannor; Thou hast made forged Writings: An Attorney is a publick person: If one saith to a common person, thou art a false and a corrupt man, no Action lieth; otherwise if they be spoken to a Justice of Peace, Intentio verborum ex animo dicentis is to be collected.

If one saith to a Steward of a Mannor, Thou hast made Writings which are forged, these words do extenuate: Thou hast stolen my Corn, no Action lieth for these words, for it may be growing; but if he saith, My Corn, for which thou shalt be hanged, otherwise it shall be.

Dodderidge. These words here are not actionable, neither for a Solicitor, nor yet for a Practicer; this here is the matter, Thou hast made forged Writings, and these may be frivolous Names, which may be set out in anothers name: None can imagin of what nature these are, innuendo, Bonds or Covenants, this will not

not aid it, what Writings these were, whether of any importance, or not, non constat.

As to the later words then, being (S.) For which thou shouldst lose thy ears, these words will not enforce the matter, this being but his mis-conceit of the words; and so no Action here lieth, neither for the first words, nor yet for the words subsequent: For one to say, Thou hast burnt my Barn adjoining to my House, these are words of Slander; but if he saith, Thou hast burnt my Barn, for which thou shalt be hanged, no Action lieth for these words, this being but the mis-conceit of the party, and do not add unto the Slander.

If one saith to another, Thou art a Thief, for thou hast stolen my Apples, no Action lieth for these words.

If one speaketh these words, I marvel you will keep company with such an one being full of the Por, no Action lieth for these words, as it hath been here adjudged; here he cannot lose his Ears for forging of false Writings, and so the Action brought by the Plaintiff, is not maintainable.

Haughton. The Action here brought by the Plaintiff, lieth not for these words; when words spoken are uncertain, by an averment they shall not be made actionable, as the Por, innuendo, the French Por, this shall not make the words actionable, being uncertain before; but if one saith of a Justice of Peace, That he is a corrupt man, these words are actionable, notwithstanding the uncertainty in some sort. As to the words themselves here in this case, he hath made these words carry no certainty of Slander, for an honest man may make forged Writings, and yet not be guilty of any Forgery, for another may put his Seal to the same, and so he is the Forgerer; also it is here altogether uncertain, what manner of Writings these were, they may be but nugatory, and of no moment.

As to the second part of the words, these do not enforce the matter for the conclusion: If the first words do not give cause of Action, the conclusion, being but the understanding and exposition of the party himself, this shall not make these words to be actionable; that he should lose his Ears for this, this is but his false conceipt, and a false conclusion of the party, and so no Action for these.

If one saith to another, Thou hast stolen my Apples off my Trees, for which thou shalt be hanged, no Action lieth for these words, being but his mis-conceit of the matter; and so in the principal Case, the words not actionable, and the Action here brought by the Plaintiff, not maintainable.

Mountague. To say of one that he is persured and forsworn, this is but recital; but if one saith of another, that he was forsworn in B. R. in a Trial there, these words are actionable; here in this Case, the subsequent words are not rational, but they do enforce the Slander to be such Original Writings, for which to lose his Ears here, and also that these ought to be Written and Forged at one time.

Dodderidge. The best way to examine these words, is to see whether these words do not bring him in danger of an Indictment; as if he be indicted for this Forgery shall this Indictment be good? it shall not, and then if he be not in danger of his Ears, no Action will lie for these words.

Mountague. Here the words subsequent, do well expound the words precedent, by which it doth appear, these to be such Writings, for which he ought to lose his Ears, so that the subsequent words are not rational words, but words Original, and thou shalt lose thy Ears: As to the Case of Indictment, this is not like to the case now in question.

Haughton. One saith to another, Thou hast stolen my Wood, for which thou shalt be hanged; for stealing some Wood it is Felony, and for stealing of some Wood it is no Felony.

The Court divided, &c.

And so without any further debate, the Judges being in their opinions in this Case two against two. (S.)

Crook Justice & Mountague Chief Justice for the Plaintiff, and Haughton & Dodderidge Judges e contra for the Defendant, and so it rested upon a Curia advisare vult, and to see the Presidents in this case, which by the rule of the Court were to be searched out, and the Court to be informed of them.

Nota, That this cause was never after moved again, but said to be ended by agreement between the parties.

*Hammond Plaintiff against Wemibank  
Defendant.*

Ejectione firmæ.

1 Ro. Rep. 429.

1 Ro. Abr. 506.

**I**N an Action of Trespass and Ejectment, upon Non culp. pleaded, a Verdict was given for the Plaintiff; upon a motion made for the Defendant in arrest of Judgment, the Case appeared to be this, (S.)

The Defendant being a Copy-holder, was summoned to appear at the Court of the Lord, to do and perform his service as a Copy-hold Tenant: he made default, upon this the Lord took advantage, by way of forfeiture; exceptions taken to the pleading of this, the matter being for a forfeiture of his Copy-hold Estate; for his refusal to do and perform his Suit and Service, by the Custom to be done by him.

It was urged, that this ought to be shewed to be a wilful and an obstinate refusal, or no forfeiture.

Also it is alledged, that the Court was held apud Manerium prædictum, and doth not shew in what house the same was held, nor yet that any notice was given unto him that it should be held; the Issue was, Whether he did voluntary refuse to come to the Court or not: And the Jury did find that he did refuse; they do also find, that notice was given to him by the Bailly of the Court, but it is not said, that this was so done by the commandment of the Lord.

Also it is shewed, that the Court was held such a day, and notice given of this to the Copy-holder, and there ought to be three Courts held, before there shall be a forfeiture taken for non-attendance.

Mountague Chief Justice. The performance of Services, is incident to every Copy-holder: If Issue was taken upon his contemptuously refusing to come, this implies a notice to be given before.

Haughton Justice. If a Copy-holder wilfully withdraws his Suit and Service which he owes to the Lord, at his Court, this is a breach of the Custom, and this is a forfeiture of his Copy-hold Estate. It is here laid; Quod sectam voluntarie, & contemptuose subtraxit, & illam facere recusavit: It is here also expressly said, that the Bailly did give him notice, per speciale mandatum domini.

Croke Justice. As touching the Custom to have this to be a forfeiture in some Cases it is so: A Copy-holder holds his Estate per redditus, servitia & consuetudines, the which if he does break, and not perform the same, this shall be a forfeiture of his Copy-hold Estate.

Dodderidge Justice. By 43 E. 3. If a Copyholder refuseth to pay his Rent, or to do and perform his Services to the Lord, this is a forfeiture of his Copy-hold Estate: the Lord is to hold his Court within his Mannor: But if the Lord doth use to hold it in such a House, and will hold this in another place, than he hath used for to do, of this he ought to give notice to the Copy-holder.



If a Copy-holder be warned to appear to do his Suit and Service in another part of the Mannor, in such a Case it may be he is not bound to perform it.

Mountague. Here it is laid, that he held his Court apud Manerium.

Dodderidge. He ought to lay, that he held his Court apud Manerium; and he ought to lay, that it was held in loco consueto.

Haughton. If there be any such matter, the Copy-holder ought to have alledged this matter in his excuse, which is not here done by him.

The Court clear of opinion, that here appears to be sufficient matter of forfeiture of the Copyhold Estate, that the Declaration is good, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for the Plaintiff, &c.

*Robinson Plaintiff against Walter Defendant.*

**I**n an Action upon the Case for a Trover and Conversion brought by the Plaintiff against the Defendant, being an Inn-keeper, for an Horse.

The Case upon the Defendants plea in Bar, was this, The Defendant keeping a common Inn, a stranger brings the Plaintiffs Horse into this common Inn of the Defendants, there lets him for some time, and afterwards goes his way, leaving the Plaintiffs Horse there as a pledge for his meat.

The Defendant being the Inn-keeper, being not paid for the meat of the Horse, retains the Horse for his meat; the Plaintiff afterwards, being the true owner of the Horse, and hearing that his Horse was there, demanded his Horse of the Defendant, who refused to deliver him, upon this he brings his Action: The Defendant by way of plea in Bar, sets forth all this matter of his keeping a common Inn, how that the Horse was brought thither, and there left at meat, which was unpaid, and that he retained the Horse for his meat, till he was satisfied for the same, and that if the Plaintiff would pay him for his meat, he would then deliver the Horse to him, but not otherwise; upon this Plea the Plaintiff demurred in Law.

Upon the first opening of this Case, the Court inclined to be of opinion against the Plaintiff; That the Defendants plea was good, and that he might well retain the Horse, and that against the Plaintiff, being the true owner of him, until he was satisfied by him for his meat, and notwithstanding his Horse was left there by a Stranger, unknown to the owner; and for this was remembered the Books of 39 H. 6. fol. 18. b. and 5 H. 7. fol. 15. b. the Case of the Leacher converted.

39 H. 6. fol. 18. b. &c.

Dodderidge Justice. This is a common Inn, and the Defendant a common Inn-keeper, and this his Retainer here, is grounded upon the general custom of the Land: He is to receive all Guests and Horses that come to his Inn: He is not bound to examine who is the true owner of the Horse brought to his Inn; he is bound, as he is an Inn-keeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the Horse cannot have him away, until he have satisfied the Inn-keeper for his meat.

9 Co. 87. b.

The Court agreed with him herein, but the Court said, that this being a new and a good Case, they held it fit to be argued by Counsel on both sides, and so for this purpose, this Case was adjourned to a further time.

Afterwards, (S.) Termin. Trin. 15 Jac. B. R. this Case was moved again, and argued on both sides.

Term. Trin. 15 Jac. B. R. &c.

Divers

Divers Authorities were cited, and reasons urged, and enforced for the Defendant, that the Plea was good. That the Defendant being a common Inn-keeper, may retain a Horse, brought into his Inn, and there left, until he be paid for his meat, and for this purpose, Coke 8. pars fol. 146, 147. the six Carpenters Case was cited, and 5 E. 4. fol. 2. b. placito 20. That an Hostler may well detain an Horse if the Master will not pay for his meat, and so of a Tailor a Garment by him made, till he be paid for it; And so is 22 E. 4. fol. 49. b. Several reasons urged for this, as (S.)

Reasons.

1. In respectu loci, this being a common Inn; where he is compellable to receive Horses coming thither, and is not to examine whose they are, and this place hath a privilege, as to a Distress, not to be distrained by another, as a Mill-stone not to be distrained, by 14 H. 8. fol. 25. nor a Horse at the Smiths Shop, by 22 E. 4. fol. 49. b. 7 H. 7. fol. 2. A Horse not to be there distrained for the prejudice of the Common-weal, nor yet in a Market or Fair; so that an Inn is there compared to a Market. A second Reason of this. (S.)

14 H. 8. f. 25.  
&c.

2. Why he may detain an Horse for his meat, nothing more reasonable, as it was urged, An Infant shall be bound by his Bond for his meat.

If one drives the cattle of another into the ground of J. S. he may, as it was urged, detain them, till he be satisfied for the hurt done by them.

3. Because here was no default in the Inn-keeper, who did entertain him; neither is he to demand whose Horse this was, for that every man hath a Licence in Law, to come with his Horses into an Inn, and the Inn-keeper cannot put him back; and so is the six Carpenters Case before remembred; but he may detain them for their meat, Mich. 6 Jac. B. R. between Harlow and Wood, the same Case was (as is here now in question) and resolved that an Inn-keeper may retain and keep an Horse left in his Inn for his meat, though it be the Horse of a Stranger.

Mich. 6 Jac.  
B. R. &c.

Mountague Chief Justice. Where one is hired to serve, there he shall not wage his Law, because compellable. Communia hospitia, are compellable to receive guests and their Horses; and so he is to answer for them, which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his Head; the Inn-holder may sell him presently, and this is justifiable. Here in this case, the Inn-keeper said to the Plaintiff, prove the Horse to be yours, pay for his meat, and you shall have him; This is no denial, nor yet any conversion, he claims no property at all; he only detains the Horse, till he be satisfied for his meat, and so he may well do by the Law; he may keep him till he be paid for his meat, because he is compellable at the first to receive him.

Dodderidge Justice. One who hath no keeping for his Horse, doth devise this way to send his man with him to an Inn, and to let him stand there, and afterwards to come thither himself, and of the Inn-keeper to demand his Horse, and upon his refusal to bring his Action upon the Case; this is a fine trick for the Plaintiff to have his Horse kept, and to give the Inn-keeper nothing for the same; but instead of paying of him for his meat, to pay him with an Action, which he hath no cause so to do; as this case here is, the Inn-keeper may well justify the keeping of his Horse till he do pay him for his meat, which is all he desires to have.

Haughton Justice differed in opinion; the party being the true owner of the Horse, hath no other way to provide for himself but this. The Inn-keeper hath his proper remedy against him, who brought and left the Horse there for his meat, and for him thus to prejudice the owner of the Horse, by the wrong of another, this will be very inconvenient.

Croke Justice. If a stranger takes my Cattel, and puts them into the ground of another, he may well keep them till I pay him for their meat and hurt there done. If a mans Horse be stolen, and brought unto an Inn, or if a man lends his Horse to one for a day, and he keeps him three or four days; The Inn-keeper here was

in

in no fault at all, if the Horse was stolen, and brought thither, he cannot charge the Inn-keeper with this, but he which brought him thither, and there left him: Here the Inn-keeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him.

Mountague. If a stranger takes the Horse of another, and sets him up in an Inn, if the Horse was there stolen away, the party may have his remedy against the Inn-keeper.

If a mans servant carries his Masters Horse to an Inn, and there leaves him, and is stolen away; an Action lyeth here for the Master, as well as for the servant against the Inn-keeper.

Dodderidge agreed this to be so, if he knew him to be his Servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his Horse, he is to look for him, and when he hath found him in the Inn, if he should not be enforced to pay for his meat, this would be a trick, to have his Horse kept for nothing, and to have him brought by his Servant to the Inn, the owner hath a benefit, (S) meat for his Horse, and for the which he ought to pay.

Curia. The pleading here is not good, therefore they did advise the party, to plead to issue, and so to go to trial, and so Judgment may then be given upon the event, but as the Case here is; Crook, Dodderidge and Mountague, clear of opinion for the Defendant against the Plaintiff.

Haughton differed from them in opinion for the Plaintiff.

And so upon the Action here brought, and upon the Demurrer to the Defendants Plea, the opinion of the Court was against the Plaintiff, that the Demurrer was not good; And so the Rule of the Court was, Quod querens Nil capiat per billam.

Nota, That the like Case, as this principal Case is, was in this Court, Term. Trin. 9 Jac. B. R. between Skipwith Plaintiff against J. S. an Inn-keeper, in a Trover, and conversion for his Horse, brought to the Inn, by a Stranger, and there detained for his meat, argued by the four Judges, and the Court therein divided; Williams and Crook Justices, That the Inn-keeper may keep the Horse till he paid for his meat.

Yelverton & Fenner Justices, *è contra*, touching this matter, vide prima pars fol. 170. 1 Pars fol. 107.

Vide also, The Custom of London, for an Inn-keeper to have a Horse praised, and sold for the meat he had eaten. Term. Trin. 10 Jac. B. R. 1 pars fol. 207. Mosse Plaintiff against Townsend Defendant. Term. Trin. 10 Jac. B. R. 10 pars f. 207.

Nota by Dodderidge Justice. If one be a Patentee of the King of a Rectory, he may well sue for Tithes in the Spiritual Court. Sir Thomas Vavifour was such a Patentee. But if they will go about to trie and determine the validity of the Grant, (S) of the Kings Letters Patents, as whether Dominus Rex concessit, or non concessit, they having no power so to do: In such a case we will then prohibit them.

The whole Court agreed with him therein.



*Smaleman Plaintiff against Eigburrow  
Defendant.*

An Action of  
Trespafs.

Cro Jac. 417.

1 Ro.Rep.441.

1 Ro.Abr.592.

2 Ro.Abr.89.

Term.Trin. 14  
Jac. &c.

**I**n an Action of Trespass upon a Demurrer, the Case appeared to be this, (S) The Defendant, and a feme sole, were Joynt-tenants for life of certain Land, the Wife takes a Husband, the Husband and Wife by their Indenture, do joynt in a Lease of the moiety of the Land of the Wife for 60 years to the Plaintiff, if the Wife and the Defendant her Companion shall so long live, rendring a yearly Rent for the same; the Wife dies, leaving the Husband; the Defendant being the Survivor, enters upon the Plaintiff, being the Lessee, to avoid the Lease, after the Coverture ended, and for this his Entry, an Action of Trespass was brought, Whether he may avoid this Lease, or not, was the only question.

This Case was several times argued at the Bar, Termin. Trin. 14 Jac. by Bridgman and Coventry for the Plaintiff, and Darcy and George Crook, for the Defendant.

The questions moved were two, (S.)

1. Whether this Lease thus made in point of Estate, shall determine or continue by the death of the Wife.

2. If this Lease be but voidable, Whether the surviving Joynt-tenant shall avoid this Lease or not.

For the Plaintiff it was urged, that if Baron & feme do join in a Lease for years by Indenture, of the Land of the Wife, rendring Rent, that this Lease is not void, but voidable, and that privies in Blood shall take advantage of non-age, or Coverture, but not privies in Law, nor privies in Estate, as appears Coke 8 pars fol. 24. in Whittinghams Case; a Lord by escheat shall not avoid a voidable Lease, because he is but privy in Law.

Coke 8 pars f.  
42.

It was further urged for the Plaintiff, that the Survivor here shall not avoid this Lease being not void, but voidable, and that a difference will be where a Lease is determined in right, and where not, by the death of the Husband or Wife; another difference likewise will be, as it was urged, where the Husband alone makes the Lease of the Wives Land, and where the Husband and Wife do join in the Lease, in both these Cases the Lease is not void, but voidable; here in this Case the Lease is only voidable, good, in respect of the possibility to survive, and of the right of the Wife by the survivorship.

If the Husband alone do lease the Land of the Wife, and dies, this Lease is not determined in fact, but is determined in right.

Commentaries  
f. 65. &c.

Plowdens Commentaries fol. 65. in Browning & Beestons Case: If the Husband alone do lease the Land of the Wife, and dies, the Lease remains good, and not determined, before the Wife by her entry do avoid this, so is 9 H. 6. fol. 43.

48 E. 3. f. 13.  
&c.

28 H. 8. Dyer fol. 28. for as to the possession, the Lease hath continuance, and remains in full force until the Wife hath avoided this by her entry; but as to the Right, this is presently determined by the death of the Husband, (where made by him alone) but when they both joynt in the Lease of the Wives Land, there after the death of the Wife, this is a good Lease in Right, for she may make this Lease good by her acceptance of the Rent, after the death of her Husband, and so is 48 E. 3. fol. 13.

4 & 5 Marix Dyer fol. 159. In this Case, the Lease (as it was urged) is but a voidable Lease, to be avoided by the Wife; and when the Wife is here dead, before she hath made this her election to have this to be a good Lease or not, the surviving

Surviving Tenant shall not now avoid this Lease, for that no such Election is given unto him, the same being at the first but voidable, by the Wife, and now by the death of the Wife, the same is become to be unavoidable.

It was also further urged, that in this Case the Survivor was not privy to this Lease, and therefore he shall not avoid it.

It was urged for the Defendant, that the Survivor here may well avoid this Lease; for that a Lease made by one joint-Tenant to charge his Companion, ought to be an absolute Lease, and not voidable, as the Lease in this Case is. Also when Baron and Feme make a Lease for years of the Wives Land, by Word, rendering Rent; prima facie, this Lease is good, because it may be made good by the Wife, by possibility, if she survive her Husband, and consents unto it, by her acceptance of the Rent, then by this agreement this is the Lease of the Wife; but if she doth not survive her Husband, but dies before, and so no agreement by her unto this Lease, then the same is not her Lease, in any respect, but it shall then be in Law, as a Lease made by her Husband alone; and so no such Lease made by the Wife, conditional, if she survive and agree, otherwise not; but as a Lease made by the Husband alone; and so no such Lease made by the Wife, conditional, if she survive and agree, otherwise not; but as a Lease made by the Husband alone. It is the Lease of the Wife, with this possibility, to be made good, and so to be her Lease, by her acceptance of the Rent, if she survive, otherwise not. And if the Lease was made by the Husband alone, the Survivor might well avoid this; because it was good only in regard of the possession; and so as it was urged, this Lease here is not voidable, but absolutely void, and so well avoidable by the Survivor, Coke 2 pars, fol. 77. b. Harveys Case, put in Cromwells Case, the Husband makes a Lease for years of the Wives Land; Afterwards Baron and Feme levies a Fine of the Land to another; the Conusee shall avoid this Lease after the death of the Husband, 7 E. 4. fol. 7. Baron and Feme make a Lease for years of the Wives Land, rendering Rent, the Husband alone brings Debt for the Rent, adjudged maintainable; because this is the Lease of the Husband alone, before his death; but if the Wife survives, and agrees to it, it shall be then the Lease of the Wife. It was further urged, that if this possibility to make this Lease good, be once reduced in actum, this shall make the Lease good, otherwise not; but here the Wife died in the life time of the Husband, so that this possibility which the Wife had, to have made the Lease good and unavoidable by her acceptance of the Rent, is now by her death determined, and ended, and this is now but as a Lease made by the Husband alone, of the Land of the Wife, and this is vana potentia, quæ nunquam reducitur in actum; and this possibility of election, and affirmation of the Lease, by the death of the Wife, is cut off, and falls to the ground, and so the Survivor, or any Stranger shall have benefit, and take advantage hereof.

Coke 2 pars,  
f. 77. b. & c.

7 E. 4. f. 7.

Coke Chief Justice. A Lease for years made by one Joint-Tenant for life, this shall be good against the Survivor. And so it is, if one joint-Tenant for life, makes a Lease for years to begin after his death, this is good; so was Harbin & Baitons Case.

Dodderidge Justice. By 11 H. 6. If the Husband makes a Lease of the Land of the Wife, by Indenture, and the Wife dies, the Husband shall have an Action of Debt for the Rent, upon the Indenture, before the Heir enters, yet the Estate is gone from the Husband. 11 H. 6.

Haughton Justice. If Tenant in tail makes a voidable Lease, for that the same is not warranted by the Statute, and dies, the Guardian in Chivalry may avoid this Lease for his time; as touching this Vide, Coke 7 pars, fol. 7, 8. the Countess of Bedfords Case.

Coke agreed with him herein, for that this is done by him in right of the Heir. But a Lord by escheate shall not avoid such a Lease, as this Case here is, for the

**Coverture of the Wife.** In this principal Case here, put the Husband out of the Case, and so if the Feme being Joynt-Tenant with another, makes a Lease for 21 years, to begin after her death, this is gone, because by his death the whole Estate is at an end, and gone. If Baron and Feme do make a Lease for years, of the Land of the Wife, rendering Rent, the Husband and Wife dies, and the Heir of the Wife accepts the Rent; there is a Book full in the point, that this Lease may be made good, by the acceptance of the Rent, by the Heir, and so by an inference out of this Case before put, this Lease here in question is not void by the death of the Wife. Also if Baron and Feme and a third person are joynt-tenants; the Husband and Wife here have but 1 moiety; if they make a Feoffment of the moiety, or if the Husband alone makes a feoffment of the moiety, and dies, no survivorship there shall be, because a possession stands not in jointure with a right; otherwise had it been, if they had made a Feoffment of the whole, there all is turned into a right, and there shall be a survivor; if Baron and Feme make a Lease for years of the Land of the Wife, rendering Rent, the Wife dies without Heir, the Lord by escheate shall not avoid the Lease.

And so without any further debate this Case was adjourned to a further time, for further argument thereof.

Termin. Mich.  
14 Jac.B.R.&c.

Afterwards (S) Termin. Mich. 14 Jac. B.R. This Case was moved again, urged, and Judgment at last given therein for the Plaintiff.

**Dodderidge Justice.** Baron and Feme make a Lease for years rendering Rent, as in this Case, the Wife dies, may the Husband have an Action of Debt for this Rent: (if the Estate be gone) he cannot; this will go far in the principal Case here; you cannot have the Rent any longer than the Estate continues, the Rent ends with the Estate, if it be so that the Estate be ended, the contract for the Rent will end also, this being but quid pro quo, (S) the Rent for the Land.

**Croke Justice.** Baron and Feme make a Lease for the life of I.S. rendering Rent, the Husband dies, Rent incurs, I. S. the cestuy que vie dies, whether an Action of Debt will lie for this Rent.

**Dodderidge.** It will well lie.

**Haughton Justice.** Two Joynt-Tenants make a Feoffment, one of them dies, the Survivor shall avoid this for Infancy, because he was party to the Feoffment, here he is to avoid this by reason of the privacy. An instance may be, where a stranger shall avoid a Lease. As if Tenant in tail make a Lease for years, which is avoidable, and dies, the Guardian in Chivalry shall avoid the same, here a reversion doth only survive unto the Joynt-Tenant.

3 H. 6.

**Dodderidge.** Without question this Lease here is only avoidable, but not void, by 3 H. 6. But here the Wife dies, the question now is, what continuance this Lease now hath, whether the same shall still continue, or not; this Lease shall still continue, and is now become to be unavoidable: the Cases remembered of Infants, and of Feme Coverts do not come unto this Case. Two Joynt-Tenants Infants, make a Feoffment in Fee; they shall have two Writs of Dum fuit infra etatem, but in a Writ of right, they shall join: If Land is given to two, and to the Heirs of their Bodies, they lose by default; they shall have several Actions; but these Cases put of Joynt-Tenants are upon another reason, than the Case now in question.

**Mountague Chief Justice.** Baron and Feme here do make a Lease, so the Freehold is charged with the charge made upon the Estate; the Joynt-Tenants Estate for life survives, who shall avoid this charge, the Frank-Tenant survives, but the Interest remains; the Freehold survives with the charges; this Lease here thus made is a good Lease, and to have continuance.

A Parson makes a Lease for years to begin after his death, the which is confirmed; this is a good Lease; as to the Rent here reserved, this is not material; this Lease was avoidable only by the Wife, the which now by her death, is become impossible



possible to be avoided, Vide Coke 8 pars, fol. 42. in Whittingham's Case, as touching this matter.

Dodderidge. In the Case before remembred, the Husband cannot have an Action of Debt for the Rent, the contract being determined with the Estate.

Haughton. The Lease here is good, and shall have continuance; and the surviving joynt-Tenant shall not avoid this Lease.

At this time the Court was clear of opinion, that the Plaintiff hath a good title by force of his Lease made unto him, and that the surviving joynt-Tenant cannot avoid the same; and so at this time it rested upon a Curia ulterius advisare vult.

Afterwards at another time, this Case was moved again for the Judgment and Resolution of the Court.

Mountague Chief Justice. In this Case we are all of us agreed, that this is a clear Case, and without any question for the Plaintiff; that this his Lease made unto him, is a good, and a continuing Lease, and unavoidable by the surviving joynt-Tenant, and therefore without any further argument, the rule of the Court was, Quod judicium intretur pro querente.

Judgment for the Plaintiff, per Curiam.

### Termin. Hillar. 14 Jac. Banco Regis.

Doctor Hufsey and others Plaintiffs, against Moor Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rot. 946.

**I**n a Writ of Error to reverse a Judgment given in the C. B. in a Writ of Raviſhment de gard, there brought by Francis Moor according to the Statute of Westminster 2. capite 35. the Error assigned and insisted upon (not being upon the matter in Law, debated and resolved in the Court of C. B. and so reported, Coke 9 pars, fol. 71. Doctor Hufsey's Case,) but the Error insisted upon, was this; The Writ of Raviſhment de gard, which was brought, is given by the Statute of Westminster 2. capite 35. by which Statute there ought to be Pledges found for the Plaintiff; but there are no Pledges returned by the Sheriff, nor yet any entry or order in Court, that Pledges shall be found, which ought so to be, this being an Original Writ, and for this Error the Judgment is erroneous, and so prayed to be reversed.

A Writ of Error.  
1 Rol. R. 445.  
1 Ro. Abr. 792.  
Cro. Jac. 413.  
Jones 77.  
Hob. 93.  
2 Brown. 59, 91.  
Coke 9 pars, f. 71. &c.  
Westm. 2. c. 35.

The whole Court agreed clearly in this, (S) that Pledges ought to be.

It was then urged for the Defendant, that this being but the misreturn of the Sheriff, shall be aided by the Statute of 18 Eliz. capite 14. which doth aid misreturn of the Sheriffs.

This Case was several times argued at the Bar, by Coventy, and Thomas Crew for the Defendant, by George Croke for the Plaintiff.

It was urged, that the Statute doth not extend to this, for that by 18 E. 4. fol. 9. 2 H. 7. fol. 1. & 17. upon every Writ or Writ, there ought to be Pledges returned, or set down, hanging the Writ; and so is 9 E. 4. fol. 27. where the difference is taken between a Bill in B. R. there Pledges ought to be the first day, otherwise in a Writ in the C. B. the reason of Pledges, being for the surety of the Kings Fine, and where there are no Pledges, this makes the Judgment erroneous; and so is 11 H. 4. fol. 7. & 12 Eliz. Dyer, fol. 288. between Chapman & Bigot. But these

18 E. 4. f. 9. &c.  
9 E. 4. f. 27.  
11 H. 4. f. 7.  
12 Eliz. Dyer f. 288. &c.

Cases are before the Statute of 18 Eliz. Pledges are the benefit of the King, the Statute never intended to aid one who is to be punished by a penal Law; and so in Blackamores Case, Coke 8 pars, fol. 163.

Coke 8 pars,  
f. 163. &c.

Mountague Chief Justice. It is parcel of the Judgment, being quod plegij in misericordia, as it is in Beechers Case, Coke 1 pars, This Statute hath made it more penal.

The whole Court agreed with him herin, that this is a penal Law, and that this is a material Error.

Afterwards this Case was moved again, and urged for the Defendant, that the not having of Pledges is no Error. The reason for finding of Pledges, being first for the benefit of the Defendant, to the intent that the party Plaintiff should prosecute his Suit. 2. Because there should be a certainty for the Kings Fine, (S) the amerciamento, and these are the true Reasons (as it was urged) for finding of Pledges; but here in this Case, both these are unnecessary, being found for the Plaintiff, and so the reason being removed, sublata causa, tollitur & effectus.

2 H. 6. f. 15. &c.

2 H. 6. fol. 15. No Pledges in a Returno Habendo, and no Error. 11 H. 4. fol. 7. In an Appeal, Pledges found, pendant the Writ, exception there taken for want of Pledges, there said, if the Defendant will, he may have them. 18 E. 4 fol. 9. put there with a Nota, by all the Justices, that the finding of Pledges, is but matter of form, and only in the discretion of the Judges 7 R. 2. Fitz. title Pledges, placito 10. where it is said, that some Sheriffs use to have Pledges found, and some not: and there resolved, That Pledges are not to be found of necessity, 13 Eliz. Dyer, fol. 288.

12 Eliz. Dyer,  
f. 288. &c.

As to the Case remembred in 12 Eliz. Dyer, fol. 288. entred Termin. Pasch. 12 Eliz. B.R. Rot. 358. the Judgment there was reversed for a fault, in the end of the Count, & unde petit remedium, being in an Ejectione firmæ, and for this new conclusion in the Count, the Judgment was reversed, but not for the not finding of Pledges; and it was urged, this appears to be so upon the Roll, being examined, yet both the Errors were assigned. But admitting this to be an Error, it is then

Stat. of 18 E.  
liz. c. 14.

aided (as it was urged by the Statute of 18 Eliz. capite 14.)

It was then further urged for the Plaintiff, that the finding of Pledges is matter of substance, and not of form, and that for want of Pledges the Judgment shall be erroneous, and overthrow; the entering of Pledges is not to be at the Suit of the Defendant, but of the Plaintiff, for his benefit, and for the benefit of the King; for he is to be in misericordia.

Coke 8 pars,  
fol. 61. &c.  
Rule for  
Pledges.

And as touching this matter in Beechers Case, Coke 8 pars, fol. 61. The Rule is there set down in general, That in all Actions, Original, Real or Personal, Pledges ought to be found, unless in two Cases, (S)

18 E. 3. f. 2. &c.  
F.N.B.f. 195.  
&c.

1. Where the dignity of the Kings Person is concerned, and therefore neither the King, nor the Queen are to find Pledges, as appears by 18 E. 3. fol. 2. Fitz. Nat. Brev. fol. 31. F. 47. d. & Fitz. Nat. Brev. fol. 101. A. That the Queen shall not find Pledges.

2. Where it is for the imbecillity of the person; as an Infant shall not find Pledges, Fitz. Nat. Brev. fol. 195. H. 14. Alizarum placito 17. But when he comes to his full age, hanging the Writ, he is then to find Pledges, or he shall be amerced; which proves the not finding of Pledges, to be Error, as it was urged. And it is to be observed for a Rule, That in all Cases where the person is to be amerced, there he ought to find Pledges as a matter of substance, and not of form. And no Law of Amendments will aid this Case, which are all put Coke 8 pars, fol. 161, 162. in Blackamores Case.

Coke 8 pars, f.  
161, 162. &c.

Mountague Chief Justice. There is no question of this Case, there is no Book, that no Pledges are to be found, 2 H. 6. which hath been remembred, hath only a glance at it.

2 H. 6.

There

There are two Reasons for the finding of Pledges. The first for the party, if Judgment be given against the Plaintiff, the Subject ought not then to be prolonged without cause. 2 Reason: for the finding of Pledges.

2. For the King, because the Plaintiff hath troubled the Court without cause, therefore he is for this to be amerced, and therefore for these two Reasons, the Plaintiff ought to find Pledges. *Fitz. Nat. Brev.* before remembred, hath a good difference. No Pledges to be found, either in regard of the dignity of the person, as of the King, or of the imbecillity of the person, as in case of an Infant; otherwise, (these two excepted) in all Cases, Pledges are to be found. Fitz. Nat. Brev.

Also this finding of Pledges, is not matter of form (as it hath been urged) but matter of substance. As for the time when Pledges are to be found, They are to be found either in Court, or hanging the *Writ*.

As to the objection made; that there is no cause here in this Case for the finding of Pledges, in regard the matter is found for the Plaintiff, and that so the reason of finding of Pledges doth here fail, and the King is to have no amercement. As to this in 12 Eliz. Dyer, before remembred, this is well debated. Whether this entering of Pledges be matter of form or not? The contrary is here resolved to be matter of substance, and that this is if Pledges be not found. 12 Eliz. Dyer.

Then as touching the Statutes, a Penal Law is out of the Statute; that which is within the provision, is out of the body of the Law. In *Beechers Case* remembred the Judgment is, *ideo querens*, & *plegij sunt in mia*; so that this is parcel of the Judgment, and therefore matter of substance.

This Case is out of the Statute of 18 Eliz. and the distinction which hath been taken, that this is but an additional Law; this will nothing at all help, and this is a very strange construction which hath been made, that because the offence was at the Common Law, therefore this is not a penal Law; the Statute of 8 H. 6. the form touching additions, this is yet a penal Law, if such a proviso had not been in the Statute of 18 Eliz. this Case had not been aided by the body of the Act. 18 Eliz. 8 H. 6.

*Croke Justice*.<sup>\*</sup> This is to be taken *pro confesso*, and so are all our Books, that Pledges ought to be found; and also that this finding of Pledges, is matter of necessity, not matter of form (as it hath been said) but matter of substance; and these Pledges may be found hanging the *Writ*. As to the Statute of 18 Eliz. the body of which Act doth not extend unto this Case, It is very clear that the proviso in the Act, doth not expressly extend unto this Case; for this is a penal Law. Stat. of 18 Eliz.

*Dodderidge Justice*. I will suspend my Judgment in this Case, until the Original, and first institution of Pledges be known, which is notable. *Coke* 8 pars, this is reported to be, to avoid trouble; the Pledges to be amerced, because he is not to vex and trouble the Kings Courts without cause. The original cause and reason still remains, although by multiplicity of Suits they are almost grown out of use. Originally it was thus, The Sheriff had it in his election, whether he would serve the *Writ*, or not, if Pledges were not found; but since it is held, that they may be found hanging the *Writ*; and in ancient time, if the Plaintiff sued one unjustly, the Judges would amerce the Plaintiff, and that grievously, until the Statute *de moderata misericordia* was made.

Afterwards at another time, all the Judges argued this Case.

1. *Haughton Justice* recited the Case, and stated the question, being only this, Whether this Judgment thus given in the Court of C. B. shall now be reversed for this Error moved and insisted upon (S) for the Plaintiffs not finding of Pledges. At the Common Law this is Error, but this is remedied by the Statute of 18 Eliz. capite 14. There is no difficulty in this, but that Pledges may be found hanging the *Writ*. And this resolves the question, for the Judges would not suffer Pledges to be entered; if the same was matter of form, the Books against this are Stat. of 18 Eliz. c. 14.



18 E. 4. f. 9.

7 R. 2. Fitz.  
&c.9 E. 4. 12 Eliz.  
&c.

Westm. 2. c. 35.

Stat. of 2 E. 6.

31 Eliz. c. 5.

7 Eliz. Dyer,  
fol. 239.Stat. of Merton  
cap. 1.

18 E. 4. fol. 9. but this is no concluding Wook, the same is matter of form, in respect of the substance of the matter, but not that the Judgment shall not be erroneous, if Pledges are not found, 7 R. 2. Fitz. title Pledges placito 10. this is in Oyer & Terminer, which is but a Commission, and therefore I do not find that Pledges are necessary to be found in that Action 9 E. 4. & 12 Eliz. Dyer, fol. 288. are direct in point, that this is Error.

It hath been objected, That a Verdict having been given against the Defendant, that now the finding of Pledges is not material; but this doth nothing at all move me, for the same was material at the first, and so appeared to the Court.

But for the second matter, This is aided by the Statute of 18 Eliz. First it is very clear, that this is within the body of the Act, for it is within one of the things mentioned therein, (S) For upon any insufficient return of the Sheriff, of the Writ, nor any other Process; these do plainly extend unto this. But the difficulty is upon the Proviso, which provides that the same shall not extend to any Action given upon any popular or Penal Law. I do agree that this Case is within the Letter of the Law; for it is an Action, and also the Statute of Westm. 2. capite 35. is penal; but as for this present Case, I do take it to be out of this exception. (S) All Actions which the King may have, and which the Subject may have, so that they are partim popular, & partim penal. An Action upon the Statute of Perjury is given to the party grieved, this is penal, because a certain pain is inflicted by the same Statute, and given to the party grieved. But a Statute which gives recompence to the party who hath sustained damages; such Actions penal, (as I intend) are not within the Statute; by way of instance, in an Action of Waste, it is a penal Law, but the recompence given, is for a wrong done in the Land. And so in the Case of an Action upon the Statute for a forcible entry, and so in an Action upon the Statute of 2 E. 6. because these are but remedies given for the parties right. But if it be a pain, set and imposed upon one by the Statute, without any respect of recompence for damages, to this the Statute extends.

This Action of Ravishment de garde, is but a recompence given for the taking away of his Ward, and therefore, &c. the Statute of 31 Eliz. capite 5. there is the like Clause, (S) That all Actions upon penal Statutes, shall be laid in their proper Counties, none will deny but that the Action for Ravishment de gard, is within the Statute, but I confess that the preamble of the said Statute doth enforce very much, 7 Eliz. Dyer, fol. 236. In a Case referred to all the Judges, that Actions upon certain penal Laws, to be sued in any of the Kings Courts of Record; these to be the Courts at Westminster, although the words are general.

The Statute of Merton, capite 1. That a feme shall recover in Dower damages where the Husband died seised; the Husband makes a Feoffment in Fee, and takes back an Estate for life, the remainder over and dies.

It hath been ruled, that the Wife here shall not recover Damages, because though the Husband died seised, yet he did not die seised of such an Estate, of which she is Dowable, and so the same not within the intention of the Statute; so here in this principal Case, although the same be within the Letter, it is not within the meaning of the Act; and so this Error thus assigned, upon the whole matter, is no sufficient cause to reverse the Judgment given in the C.B.

Dodderidge Justice. The Judgment given in the Court of C. B. is erroneous for the Error assigned, and ought to be reversed.

At the Common Law this is Error; in the deciding of which, as touching Pledges, it is very plain, that at the Common Law, Judgment given in an Action, in which the Plaintiff is to find Pledges, if none be found by the Sheriff, nor per hanging the Writ, this is a clear Error. 1. I will consider how this finding of Pledges stands, since the Statute of 18 Eliz. cap. 14.

As touching Pledges, and the finding of Pledges at the Common Law, I shall consider these three things, (S)

1. Quere,

1. Quare, Wherefore Pledges are to be found.

2. Ubi, Where they are to be found. And

3. Quando, When they are to be found.

1. As touching the first, being Quare, why Pledges are to be found: The reason of which is, because the Plaintiff shall not vex any of the Kings Subjects, nor yet molest and trouble the Kings Courts, with frivolous, malicious, and such like Suits, which do not grow upon any just ground. Touching the finding of Pledges.

For the rule of Law is, That every Declaration of Writ, ought to contain certainty and verity, and for default herein, Amerciaments grievous were imposed upon the Plaintiffs, until the Statute of Magna Charta, cap. 14. which doth enact, that Amerciaments shall be secundum modum delicti, salvo contentamento suo, afterwards in a Replevin, for the benefit of the Sheriff only, Pledges to be found, otherwise a Detinue shall be brought against him, and this by the Statute of Westminster the second, cap. 2. he is therefore to look unto this, so that the reason of finding of Pledges at the Common Law, was to take away multiplicity of Suits: The form of Writs being, (S) Si querens fecerit te securum de clamore suo prosequendo, for otherwise the Sheriff is not bound to summon the Defendant.

2. Ubi, Where Pledges are to be found: As to this, they were to be found in three places, (S) 1. In the Chancery, when the Original Writ was taken out. 2. To the Sheriff, upon the Writ to him delivered. 3. In Court, hanging the Writ: If he finds Pledges in the Chancery, then the Clause in the Writ, Si querens fecerit te securum, was omitted by all our Books; if no Pledges found before the Sheriff, this is no matter to defeat the proceedings, but he may then find them, pendente placito.

Three Objections have been made against me, (S.)

1. That his finding of Pledges is but matter of form, and to prove this, 18 E. 4. fol. 9. cited, there is the opinion of the Reporter to be so, but he is therein deceived.

2. Although this be more than matter of form, yet this omission shall not hinder Judgment, 3 H. 6. fol. 1. In a Replevin, the Sheriff had not found Pledges, upon the Returno habendo, but this is not to stay or hinder Judgment: This is to be agreed, for there Pledges are to be found for the benefit of the Sheriff, and this is his Laches and default, if he will not have them to be found.

3. And which is the most material: here the matter is found for the Plaintiff; and therefore the finding of Pledges here in this Case is not material; no use being now here of Pledges, because it is found for the Plaintiff, for whom Pledges were to be given.

8 H. 5. fol. 8. b. gives a full answer unto this, and to all the three Objections: In a Formedon, proceedings were to issue, and tried for the Plaintiff. It was moved in Arrest of Judgment, that no Pledges were found for the Plaintiff, and for this cause Judgment was there stayed, although the Verdict was found for the Plaintiff.

12 Eliz. Dyer, fol. 288. before remembered, and in a Bill in which there is some variance and question, whether Pledges may be found, hanging the Writ, but here they were found. 12 Eliz. Dyer, fol. 288.

9 E. 4. fol. 1. & 12 Eliz. Dyer, Judgment was reversed for this cause; so that by all this it appeareth, that at the Common Law this finding of Pledges is not matter of form, but of substance, and that the omission of this shall make the Judgment to be erroneous: It is impertinent to shew what persons are to find Pledges.

The Rule of Law is, That in all Cases where the Plaintiff is to be amerced, there he is to find Pledges; otherwise it is, where he is not to be amerced. Rule of Law, &c.

As

As in the Case of Infants, of the King and Queen, all which doth at large appear, Coke 8 pars, in Beechers Case before remembred.

2. As to the second matter to be considered, touching the Statute of 18 Eliz. cap. 14. whether this Case be within the aid of this Statute.

As to this, it is very plain that this Statute gives no aid unto this Case, the same being very clearly within the Statute, within the Proviso thereof, which doth not extend to any Writ or Declaration, for Felony, Murder, Treason, because these are Corporal punishments in the highest Degree: For yet to Process, Writ, Bill, Action or Information, upon any popular or penal Law: This here is not a popular Action, for it is called, popular quia quilibet de populo may pursue this: But this is penal, and so it hath been agreed to be within the letter of this Statute, and also it is within the meaning of the same; penal Laws are those which do inflict penalty, & omnis poena, aut est pecuniaria, Corporalis, or exilium, and what Law can be more penal than this Statute, which includes all these three, (S) Pecuniary, Corporal and Exile. All this you may find within this Law, for he shall pay Damages, he shall suffer Imprisonment, and he shall be Criled, so that this Statute comprehends all penalties, except mutilation of members, or death, so that this is a penal Law, with a Witness, and so this Case is plainly within the letter, and it is also within the meaning of this: The meaning of the makers of a Law, is to be gathered by their words: And when I have no president nor reason to move me, that the meaning of the Statute is otherwise, than the letter of this doth purport, there I ought to stick close to the letter; but it hath been thus distinguished, That all Actions which do inflict penalty, for satisfaction, and not for the offence, are within the Statute of 18 Eliz. as the Statute for waste, damages given for the hurt, as it hath been urged.

Westm. 2.  
cap. 35.

But here this Statute of Westminster 2. cap. 35. is cumulative, the same gives damages, corporal punishment, and exile, to lose his Country, and if this be not a penal Law, I do not know what Law is penal: And so in this Case for the matter alleged, this Judgment given in the C.B. at the Common Law, is erroneous, for not finding Pledges, and this is not aided by the Statute of 18 Eliz. and so for this Error the Judgment ought to be reversed.

Croke Justice agreed with him herein, that for this cause the Judgment is erroneous, and ought to be reversed; we do all of us agree, that at the Common Law this not finding of Pledges, is a good and a clear Error for to reverse a Judgment, 9 E. 4. for want of Pledges, Judgment was reversed.

The reason of the Law, as to the finding of Pledges, is very notable, being, for the avoiding of unjust vexation, that will not make the Law a scourge to others, without being punished for this himself; Pledges may be found, either in Chancery, as in Appeals, there they are found: They are by the Law commanded to be found, and therefore not to be omitted; for as Lex nihil frustra facit, ita Lex nihil frustra jubet, and therefore in regard the Law hath commanded this finding of Pledges, necessarily by the course of the Common Law they ought to be found, and this to be so observed as a special Maxim of the Law.

Stat. of 18 Eliz.

As to the Statute of 18 Eliz. clearly this Case is not aided by this Law: The Body of the Law doth not extend unto this Case, for this doth aid insufficient Returns, but not no Returns, and here is no Return upon the matter.

If the Sheriff doth not put to his name, this is not aided by this Statute, so if it be album breve, not aided; these are not within the words of an insufficient Return of the Sheriff.

2. If this Law extended but to multiplication of damages, I should then be of another opinion, but here it doth extend to the Body: An Action upon the Statute of forger of faux faits, not doubted but the Statute extends to this: If the Statute had been in the Conjunctive, (S) popular & penal, yet the same ought to be



be construed in the Disjunctive, so that notwithstanding the Statute of 18 Eliz. this Case stands still as a Case at the Common Law; and this not finding of Pledges being matter of substance, and not of form, is a good Error, and for this Error the Judgment ought to be reversed.

Mountague Chief Justice. I am in this Case clearly of my former Opinion, and am now much confirmed therein, that this Judgment ought to be reversed: I have delivered my opinion before, with the reason for finding of Pledges, this being not matter of form, but of substance; and so very material.

As to the Statute of 18 Eliz. if this Case be within the Body of the Act, it is yet excepted very clearly in the Proviso; but I do hold that this Case is not aided by the Body of the Law: Insufficient Returns are by this Statute aided, and want of an Original; but it is not therein expressed, that want of a Return, but an insufficient Return is aided; here the person against whom to have Judgment, is not returned omnino, for the Judgment ought to be against the Plaintiff and his Pledges, and so this is no Return, and therefore not aided by the Body of the Act.

As touching the Proviso, If the Stat. of Westmin. 2. cap. 35. be a penal Law, then the same is within this Proviso.

This difference hath been taken by way of Objection. That Cases remedial are not within this Law, as a penal Law to punish a wrong done; this is within the Law, but not a penal Law, which gives remedy for the wrong by way of recompence.

As to this Case, here is a penal Law for a wrong done, if the Law which doth punish wrong, and goes to the person, not to the possession, this is a penal Law within this Statute, and therefore the Case of Waste, and of 2 E. 6. before remembered, are answered not within this Statute; as to the Statute of Westminster. 2. at this time no Inheritance greater than the Service of Men; a great wrong it is, to take away Wards, remedy given at the Common Law; if take and give satisfaction, this is not to have recompence, but to punish the wrong, this is a Statute to punish force, not to give remedy for a wrong for 2 years Imprisonment, notwithstanding satisfaction given.

If he takes away a Ward, and marries him, this makes him a Felon absured, if not able to satisfy the party; this is penal, not to give recompence for a wrong personal nor real.

And so upon the whole matter, this is an apparent Error, and not aided by the Statute of 18 Eliz. and so for this Error the Judgment ought to be reversed.

Dodderidge. This is a very strict Law, for *actio personalis moritur cum persona*, but here the Executors may sue.

The whole Court, (Haughton except) agreed clearly, that for this Error the Judgment reversed, and so by the Rule of the Court, the Judgment was reversed.

*Sanford* Plaintiff, against *Stevens* and *Smith*  
Defendants.

Entred Termin. Trin. 14 Jac. B. R.  
Rot. 460.

**I**n an Action of Trespass for breaking of his Close, and for assaulting three of his Servants: And for his title shews, that this was Copyhold Land, parcel  
of

of such a Mannor, of which one Church was the Lords, and that Church, 34 Eliz. did grant this Coppelhold unto Sanford and his Heirs, virtute cuius, &c.

The Defendants as to the Assault do plead Non culp. and for the Trespass in the Close, Smith the Master and his Servants do justify in this manner (S) They confess the Close to be Coppelhold Land, but plead, that long time before, it was parcel of the Mannor of Crippellhal in Essex, and that long time before the supposed Trespass, one Pole, and Margaret his Wife, was Lord of the said Mannor, in the right of his Wife, for life, the remainder in tail to Stevens, and made a Lease for years of this Land unto Smith, by force of which Lease he was possessed, and cut the Trees, and his Servants aided him in carrying of them away, and so justifies by this his Plea in Bar, but doth not shew how Pole and his Wife came to this Estate for life, the remainder over.

To this Plea in Bar, the Plaintiff demurred in Law, because the Defendant therein hath not shewed as he ought to have done, how Pole and his Wife came to this Estate for life, the remainder over.

The whole Court upon the first opening of this Case, agreed clearly, that this Plea in Bar was not good, because it is not therein shewed, how this particular Estate pleaded to Pole and his Wife for life, the remainder in tail to Stevens, hath its commencement, they claiming under a derivative Estate for years, made by Pole and his Wife; they ought in pleading the Bar, to have set forth how this Estate thus came to Pole and his Wife, with the remainder, for which omission the Plea in Bar is not good.

The matter in Law that was in this Case moved, being a Coppelholder of Inheritance, having no custom to cut down Timber-trees, whether the Lord of the Mannor may cut them down: If the Coppelholder by the Custom, may cut down Timber-trees, (fore expendenda) this is good per Curiam.

Also by the whole Court, if a Coppelholder by the Custom may cut down Timber-trees for reparations, he shall have the Timber-trees, the Top, Top and Bark of the same also.

Trin. 14 Jac.  
E.R. &c.

To this purpose the Court remembred a Case in this Court, Trin. 14 Jac. B. R. Rot. 461. between Lewis and Smith, being the same Case with this principal Case, and also for Coppelhold Land, parcel of the same Mannor: The same rule then given by the Court, as now in this Case.

The whole Court clear in this, that by the Custom the Coppelholder is to employ the Timber for his reparation, with the Top and Bark he cannot repair, but these he is to have, and may sell them towards the defraying of his charge in reparation.

Judgment for  
the Plaintiff,  
per Curiam.

The whole Court clear of opinion, that the Plea in Bar here is not good, for the omission before remembred therein, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

### Payn Plaintiff, against Worth Defendant.

Trespass.

**I**n an Action of Trespass for an Assault and Battery, laid to be at Bishops-street in Comit. Hartford: The Defendant comes in, and by Plea shews that he was Servant to a Scholar of St. Johns Colledge in Cambridge, that they are to have Conuſance there, and not to be drawn out of the University, and shewed their Charter for Cambridge and for Oxford, and the Act of 13 Eliz. for confirmation of the Charter for Oxon, and for Cambridge: To this Plea the Plaintiff demurs in Law, because the Defendant hath taken no Travers, which he ought to have done with an absque hoc, that he was culpable in any place, extra Universitatem Cantabrigie; that so they might have taken Issue.

The

The whole Court clear of opinion, that the Defendant here ought to have concluded his Plea with a Traversers, and that for this omission the Plea is not good and the Plaintiff had just cause of Demurrer, and so by the Rule of the Court, Judgment was given for the Plaintiff.

*Meslyne Plaintiff, against Farneden*  
Defendant.

**I**n an Action upon the Case for scandalous words laid in the Declaration, to be spoken at several times: The first time they are laid to be spoken, De pre-fato querent: The words laid to be these (S) That persured Knave, pre-fat scilicet querent innuendo, (communication being laid to be of him) stands persured upon Record, at the Guild-hall London, and I will prove it.

At another time it is laid, that he spake to the Plaintiff himself in this manner, (S) Thou art a persured Knave, and standst persured upon Record, for denying of thy own hand, and I will prove it; upon Non culp. pleaded, this was tryed before Mountague Chief Justice, Mich. 14 Jac. at the Guild-hall a Verdict was found for the Plaintiff, and entire damages of 20 Nobles given to him.

It was moved in Arrest of Judgment for the Defendant, upon the first words, that they are not actionable, because it is not shewed in what Court this Perjury is recorded, there being two Courts, one which is a Court of Record, and the other not so, and it may be in this Court which is no Court of Record.

And also, that the later words do extenuate the former: It was likewise moved that these words being laid to be spoken at several times, the Jury here have given entire damages, which is not good.

As to the first matter moved, the Court was clear of opinion, that of necessity it ought here to be intended, to be in a Court of Record, for it is oppositum in objecto, to say that he stands persured upon Record, if it was not in a Court of Record, and therefore this shall so be intended.

As touching the later words, the Court was clear of opinion that they are Actionable without any colour of defence.

As touching the entire damages given by the Jury, and this moved in Arrest of Judgment, where some of the words are actionable, and some of them not so.

The Court over-ruled this, that the entire damages here are were well given by the Jury, and the same shall be taken to be for the words which are actionable, and not for the other words.

Haughton Justice. If the words were spoken at several times, and some of the words are actionable, and some others not, and two several Actions brought for these words, and both of them found for the Plaintiff, and damages entire given, this is not good: But otherwise it is here in this Case, there being but one Action brought for all the words, and in the Declaration laid to be spoken at several times, and entire damages given, as in this Case, this is good, and the damages well given.

And so for this, the whole Court over-ruled this Case clearly upon the later words; And therefore by the Rule of the Court, Judgment was given for the Plaintiff.



Weal Plaintiff, against Wells Defendant.

Entred Termin. Trin. 14 Jac. B. R.

Rot. 887.

Action upon  
the Case for  
Conspiracy.

**I**N an Action upon the Case for a Conspiracy, to indite him of Felony, and that also & maliciose crimen Feloniae. He laid to his charge, for the supposed stealing of five Stears, upon this he was tryed and acquitted.

The Defendant pleads in Bar, and shews that eighteen Novembris, at Bermingham he was possessed of five Stears which were stolen from him; that he made fresh suit after them, that they were found in the possession of the Plaintiff, that he came to him and demanded to have the sight of them, which he refused to do, and gave him very uncertain answers, by reason whereof he did suspect him, and so procured a Warrant, and had him before Sir Thomas Benner to be examined, and for his uncertain answers upon his Examination, he did also suspect him, and committed him, binding him over to appear at the next Sessions to answer this matter, and did then also bind the Defendant to prosecute against him. At which time, he did accordingly prosecute an Indictment against him, and then gave this matter in evidence to the Jury against him, who did acquit him; and so justifies his Proceedings.

This Case was  
argued, &c.

The Plaintiff replies, and shews that he was a Butcher, and that he bought these Stears in Market overt, and had tolled for them; and that he had killed three of them; and takes a Traverser absque hoc, that he refused to shew them to him; upon this Replication the Defendant demurs in Law, supposing the Traverser to be too short, for that he hath not answered, all which is laid against him.

This Case upon this Demurrer was argued, Termin. Mich. 14 Jac. B. R. and then it was urged for the Plaintiff; That this being in an Action upon the Case, for imposing of Crimen Feloniae. It is good for the Defendant to shew, that a Felony was committed, and so to have a suspicion of the Plaintiff. And this is good, notwithstanding he is not Guilty; but he is to shew a cause for to induce this, which cause is traversable, as appears by 7 E. 4. fol. 20.

7 E. 4. fol. 20.

If it be laid, that by the common Voice he is culpable of this; here issue is to be taken upon the cause of suspicion, and not upon the suspicion it self.

Here, First he alledges that he found the Cattel in his possession, this is but an inducement to the suspicion. But as to this, the same is confessed, and avoided, by his being a Butcher, and by the sale made to him in Market-overt.

As to the second matter, that he refused to shew these Cattel to the Defendant, being by him demanded so to do. This is a material inducement, and therefore to be traversed.

Thirdly, That he refused to shew by what way, or means he came by these Cattel.

7 H. 4.

This is material, and this is traversed, and there is no other material matter alledged here to be traversed by the Plaintiff (as it was urged) 7 H. 4. Suspicion is a matter secret, and not traversable.

11 E. 4. fol. 4. b. In such an Action brought, he ought to shew some cause of suspicion, the which cause is traversable. In 2 and 5 H. 7. this matter is there long argued, A Felony done, and the common Voice and Fame there questioned, whether this be a sufficient cause?

It was objected, That here he should have concluded, De injuria sua propria, absque tali causa.

In answer to this, It was urged that this could not so be, for that then the Trial ought to have been of both Counties, and London being one, cannot joyn with the other; and therefore the Issue is to be of one of them, 2 H. 7. fol. 3. one justifies a Robbery in one place, agreed there, that by the Plea, De injuria sua propria, all the cause is in issue; where they cannot joyn, there such a Plea, De injuria sua propria absque tali causa, is not to be, as it is adjudged in Point, in 2 H. 7. as it was urged, and so is 16 H. 7. fol. 3. b. and 2 E. 4. fol. 9. 21 H. 6. fol. 5. and Coke 8 pars. fol. 66. in Croges Case, And as to matter of Record, a Plea de injuria sua propria absque tali causa, is not to be, and so was it resolved, as it was urged.

Pasch. 40 Eliz. between Downing and Mayward, this is to be no good Issue, and Pasch. 40. &c. 16 H. 7. fol. 3. there agreed to be good Law to take Issue upon the one matter, or the other.

And so without any further debate, this matter was by the Court adjourned to another time, to hear further argument herein.

Afterwards (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and argued on both sides (S) by Coventry for the Plaintiff, and by George Croke for the Defendant. Termin. Hillar. 14 Jac. B. R. &c.

The sole point being, Whether the Traversers here taken, be of a matter Traversable?

2. Whether the Traversers here taken be of all that which is traversable?

It was urged, that the Traversers is well taken, and of all which here is traversable.

It was urged, that first the cause of suspicion is traversable; propter varias, & incertas rationes.

It must be agreed, that the Cattel were in the Possession of the Plaintiff; but he being a Furrier, bought them at Barnet, in Market overt, and did Told for them.

The cause of suspicion is traversable.

4 H. 7. fol. 2. 5 H. 7. fol. 4, 5. Common Voice and Fame is traversable;

2 H. 7. fol. 3. & 16 H. 7. fol. 3. The Felony, or the common Voice and Fame 4 H. 7. f. 2. &c. traversable.

11 E. 4. fol. 5. 7 E. 4. fol. 20. & 2 H. 7. fol. 9. All agree, That the Common Fame, or the cause of suspicion is traversable.

16 H. 7. fol. 3. b. Where two Counties cannot joyn, there not to plead, de injuria sua propria. Also where it is said, propter varias, & incertas responsiones. This is not traversable, as it was urged.

It was urged for the Defendant in maintenance of his Plea in Bar, and justification of his Proceedings. That 18 Novembris, at Birmingham he was possessed of five Oxen, stolen from him by a Stranger, upon fresh pursuit, he heard they were in the possession of the Plaintiff; he demanded sight of them, but he refused to let him see them, he said that he had killed four of them, refused to shew him the Skins, which was the ground of his suspicion; upon this, by Warrant he was brought before Sir Thomas Bennet, and by him examined, & propter varias, & incertas responsiones, he suspected him likewise, bound him to the Sessions, and the Defendant to prosecute; upon this he was indicted, and acquitted, and so doth justify his Proceedings.

The

The Plaintiff replies, confesseth the Goods that they were stolen, and brought to Barnet, to the Parker, where he being a Butcher, bought them, and did Toll for them; that for this he was indicted, and acquitted, and takes this Travers, (S) absq; hoc, that he refused to shew them to the Defendant; upon this Replication a Demurrer.

It was urged, that if the Replication be bad, then there is a good justification of the Accusation laid against him.

It is to be agreed, that where a cause is alleaged, as the common Voice and Fame, this is to be traversed.

7 H. 4. f. 32.  
27 H. 1. f. 2.

7 H. 4. fol. 32. 27 H. 8. fol. 2. In a Conspiracy, that by the command of a Justice of Peace, he did exhibit the Bill of Indictment, this a good excuse; so here in this case, the Justice of Peace did suspect him, bound him over, and the Defendant to prosecute.

Hill. 4 Jac. B. R.  
Rot. & c.

Hillar. 4 Jac. B. R. Rot. 886. Between Cox and Wirtall, the like Action brought, for causing him to be indicted for Ravishing of his Daughter, and that he was acquitted, the Defendant pleaded that his Daughter did complain unto him, upon which he complained to a Justice of Peace, who upon examination bound him over, and bound the Defendant to prosecute; the Court there resolved, because the Father, upon complaint by his Daughter to him, went and complained to a Justice of Peace, in compassion of his Daughter, that the Justice of Peace binding him over, and the Defendant to prosecute; this was adjudged to be a good excuse for what was done by him, and the Travers of the Felony not good; the like Case was in 44 Eliz. B. R. between Chambers and Taylour. In a special Action upon the Case brought for procuring him to be indicted for stealing of Cloth, the Cloth was stolen, and in his possession, being a Broker, he refused, as in this principal Case to let him see the Cloth; upon this he complained to the Recorder of London, who bound him over, and the party to prosecute; upon this he preferred his Bill of Indictment, and this was there held to be a good excuse. In this Case, De injuria sua propria, absq; tali causa, had been a good Travers.

Coke 9 pars. f.  
29. & c.

Coke 9 pars, fol. 29. in Alexander Poulter's Case. The Common Law of the Land doth allow of this, that if one hath cause of complaint, and doth accordingly complain, this is a good excuse, for what he doth in a legal way.

21 H. 7. fol. 18.  
Kilway.

21 H. 7. fol. 81. In Kelaway, to the same purpose in a Conspiracy, that where there is cause of complaint, this is a good cause to excuse him in a Conspiracy; so here in this Case here was just cause; this concerns all the Justices of the Realm, as it was urged; the like Travers was taken in Chambers Case, as here in this Case, and there by Popham Chief Justice, and the rest, the Travers held not good; the Demurrer there for the same cause, and held good.

As to the Objection here against the Plea in Bar, it is not material, if the Plea in Bar be defective, the Replication hath made it good, and the Demurrer is to this.

Mountague Chief Justice. As Men must not be discouraged to prosecute Felonies; so they are not to be animated, for to vex the innocent, here the Action brought, quia sciens, that he had bought them, yet procured him to be indicted.

Dodderidge Justice. Here is a Bar, and a Replication, De injuria sua propria absque tali causa, this could not so have been in this Case, for this had been a Travers, to all the other matters before alleaged. Here is a good ground of suspicion.

The Travers here being absque hoc, that he refused to shew him the Cattel this is a good Travers, and an Issue might have been taken upon it; but by such a Travers, as de injuria sua propria, absque tali causa; by this the Plaintiff would have been tried, because that part of the Bar is good. The Travers here, as it is taken is good, and no cause of Demurrer, propter varias, & incertus



incertus responsionis, this is a good Cause of suspicion, but is not Traversable.

Haughton Justice. It is here set forth in the Plea in Bar, that he refused to shew him the Oren, being demanded so to do: This was a manifest Cause of suspicion, and well Traversable; but propter varias & incertas responsiones, this is only set down for aggravation, and like unto alia enormia.

Dodderidge. If the Bar be good, then the Defendant ought to conclude with a Travers, (S) absque hoc, that he did exhibite a malicious Indictment.

Haughton. The suspicion of the Justice of Peace here is not at all material.

Dodderidge agreed with him herein; If he refused to shew him the Cattel, this was a good cause of suspicion, and this was a good ground for him to bring him before a Justice of Peace to be examined; the suspicion of another Man is not to be traversed.

In this Case the Court seemed to be of opinion against the Defendant, that the Travers was well taken by the Plaintiff, and the Defendant had no cause of Demurrer, and so this Case was adjourned to another time, for the Court to be further satisfied herein; but the same was never moved again; but ended between the parties, as was reported, they perceiving the opinion of the Court which way it was. Ended by agreement.

The first of these is the ...  
the second is the ...  
the third is the ...  
the fourth is the ...  
the fifth is the ...  
the sixth is the ...  
the seventh is the ...  
the eighth is the ...  
the ninth is the ...  
the tenth is the ...

# Termino. Paschæ,

15 Jac. Banco Regis.

*John Stirt* Plaintiff against *Patrick Drungold*  
Defendant.

Entred Termin. Hillar. 14 Jac. B. R. Rot. 650.

**I**n an Action upon the Case, for a Trover, and conversion, The Plaintiff declares, and shews that 20 Septembris 14 Jac. he was possessed of an Horse, a saddle, a bridle, and a saddle-cloth, as of his own proper goods and Chattels, and he being so thereof possessed, the same day and year he casually lost them, the which the same day and year, came to the hands of the Defendant, and he knowing them to be the goods of the Plaintiff, refused to deliver them, being requested so to do, but afterwards, (S) 1 Octobris 14 Jac. did convert them to his own proper use, ad dampnum querentis, 30 l. unde actio.

The Defendant pleads, and sets forth that before these goods came into his possession by Trover, as in the Declaration is expressed, and before the conversion, (S) by the space of two years last past, he did keep a common Inn, called the Sword and Buckler in Holborn in the Parish of St. Gyles in campis, the which was a Common Hostry. And that before the time of the conversion laid, one William Hadlane was possessed of the said Horse, and came riding upon him into his said Inn; with the saddle, and he did then request the Defendant to keep the Horse there at meat, and so he did for the time and space of 7 Weeks, which came unto 23 s. and that afterwards (S) 6. Novembris 14 Jac. the Plaintiff came thither and demanded his Horse, the Defendant answered, that if he would pay him for his meat he had eaten, he would deliver him, which to do he refused, and for his satisfaction, he detained the Horse, upon which Plea the Plaintiff demurred in Law.

The whole Court clear of opinion for the Defendant, and that he might well keep the Horse until satisfaction was made unto him for his meat. And by the rule of the Court, Judgment was given for the Defendant, that this Plea was good, and the Plaintiff had no cause of Demurrer, and therefore the Judgment of the Court was, quod querens Nil capiat per billam.

But some question was made whether he might retain the Saddle, Bridle and cloth as well as the Horse.



## Smith Plaintiff against Bowles Defendant.

Ehtred Termin. Hillar. 13 Jac. B. R.

Rot. 874.

*Ejectionis firma.* **I**n an Action of Trespass and Ejectment, upon Non culp. pleaded, the Jury found a special Verdict, upon which, the Case appeared to be this: A Prebend makes a Lease for years of Land, parcel of his Prebendary, with an Exception of the great Wood, as Oaks, Ashes and Crab-Trees, which Lease is confirmed by the Arch-Bishop, Patron, but not by the Dean and Chapter, Whether this Lease shall be good to bind the Successor, or not, which was the first question.

A second question, which was the chief and main point: In the first Lease there was an Exception of all the great Woods, as Oak, Ash, Crab-tree; the second Lease being the Lease now in question, was without the said exception, being before usually demised, with the exception, whether this Lease be good or not, upon the Statute of 13 Eliz. cap. 10.

Stat. of 13 Eliz.  
&c.

It was urged, and so agreed by all, that this confirmation by the Arch-Bishop, Patron, without the Dean and Chapter, is good, and shall bind the Successor, and for this was cited, 33 H. 8. Brooks Cases, fol. 46. placito 202. Plowdens Commentaries 2 pars fol. 528. in Hare & Bickleys Case, & 19 Eliz. Dyer fol. 357. It was urged, that a Prebend is within the Statute of Leases, which was made 32 H. 8. cap. 28. and for this was remembred 3 Edw. 6. Brooks Cases, fol. 86. placito 395. Brook tit. Leases, placito 62. and the Lease of a Prebend shall bind his Successor.

Stat. of 32 H. 8.  
&c.

But the second and chief point is upon the exception: In the first Lease, grand Woods, as Oak, Ash and Crab-tree, are excepted, but not so in the second Lease, Whether the want of this exception shall make the Lease void, by the Statute of 13 Eliz. cap. 10. the same being before usually demised with the same Exception.

It was urged, that this omission of the Exception in this second Lease shall not make the same Lease void within the Statute.

It hath been objected, that by this exception the soil should be excepted, if so, this may be dangerous: But by this exception, the soil is not excepted, but the heads only of the Trees are excepted, and therefore this omission of this exception in the subsequent Lease, shall not overthrow the same, and for this, 33 H. 8. Brooks Cases was cited, fol. 51. placito 225. Brook tit. Reservation placito 39. That by the exception of Woods, and sub-Woods, by three against two, the soil is excepted; this being doubted in 14 H. 8. fol. 1. & 28 H. 8. Dyer fol. 19. 7 E. 6. Dyer fol. 79. Coke 5 pars fol. 11. a. in Ives Case the former doubt resolved, that by this exception the soil it self is excepted; but here, (as it was urged) there are other words: In 46 E. 3. fol. 22. excepting grand Woods, by the better opinion there, the trees, but not the soil excepted.

33 H. 8. Brook  
Cases, &c.

It was urged further, that in this Case there is a full explanation, that he intended great Wood to be excepted, but not the soil, Herbage nor the under-wood, so that here he did not intend to except the 40 acres of Land, but the Trees only growing thereon.

As to the chief question in this case, Whether the omission of this exception in this second Lease, shall overthrow the same, which is a new question, (as it was urged)

urged) upon the Statute of 13 Eliz. 10. The intention of which Statute, as it was, to preserve the Possessions of the Church, so the same was likewise to uphold poor Tenants Leases.

This Case, (as it was urged) is out of the preamble and mischief of the Law, it is out of the letter and body of the Law, and therefore to be adjudged out of the Statute.

The preamble of the Statute makes mention of long Leases, the causes of Dilapidations, and decay of Hospitality, and which tends to the impoverishing of the Successor, this to be but for three lives, this not unreasonable; nothing is here in this Lease omitted (but this exception) being in the former Lease; this belongs to the Tenant of common right, and reason will that he should have his Bootes, and therefore the omission of this exception shall not make this to be an unreasonable Lease, and so void by the Statute.

It was further urged for the upholding of this Lease, that this could not be any cause of Dilapidation, but a means to uphold the House; also if this exception had been in the Lease, yet the Successor could not have medled with the Trees, so that he is no ways impoverished by the omission of this exception, for if he cut down the Trees, a Prohibition lieth, so that this Case is clearly out of the preamble of the Statute (as it was urged:) As to the Body of the Act, the usual Rent to be reserved.

It hath been objected, not to demise more than in usual Leases, and for this a Case cited out of the Lord Mountjoys Case, Coke 5 pars, where an Acre of waste ground was added to the new Lease, and so not warranted: It had been so in this Case (as it was agreed) if the Soil, by this exception, had been reserved: But it is not so, here the Trees are only excepted, the Rent is reserved out of the Soil, and the Lessor doth not here suspend his Rent, by cutting of a Tree down upon the Land, for the Rent is out of the Land, 4 Eliz. Dyer fol. 212. a Lease for years made of the Greyhound in Fleet-Street, with divers implements, rendering Rent, the Rent there shall not be apportioned; the Rent there goeth out of the Land, and so is 35 H. 8. Dyer f. 56. a Lease made of Land, and of Sheep rendering Rent, the Rent is out of the Land; and 12 H. 8. fol. 11.

Co. 5 pars &c.

It was then Objected, That here something doth pass from the Successor, which was not before granted: But it was urged, that here the same Rent is reserved. If a Prebend grants Common of Estovers, and afterwards makes a Lease discharged of Estovers, this shall not overthrow the Lease, (as it was urged) Coke 5 pars fol. 37. in the Dean and Chapter of Worcesters Case; if in a later Lease there is no reservation of a Heriot, as was in the former Lease resolved, that this omission of the Heriot, shall not make this Lease void, the usual Rent being reserved: But if there be any words in the Statute to take hold of this, yet (as it was urged) this is not within the meaning of the Statute: If a Prebend do lease a Park, excepting the Deer, this Lease ended, he makes a Lease of the Park, without excepting of the Deer, this shall not avoid the Lease, (as it was urged) out of Richard Lifords Case, Coke 11 pars fol. 46.

Co: 5 pars f. 37 &c.

And so without any further debate at this time, This Case was adjourned over for further argument.

Afterwards, (S) Term. Mich. 15 Jac. B. R. This Case was moved again, and upon moving of the same, without any further argument made herein: The Judges being all of them fully agreed herein, did resolve and over-rule this as a very clear Case against the Defendant, who claimed under this Lease without the exception that the same was no good Lease warrantable by the Statute of 13 Eliz. cap. 10. but a void Lease by the same Statute: And so by the Rule of the Court, Judgment was given for the Plaintiff against this Lease.

Judgment for the Plaintiff.

## The KING against Doctor White.

A Quo Warranto.  
tanto.

**I**n a Quo Warranto, for using of certain Liberties within the Mannor of Bradwel in Comitatus Essex juxta mare.

Doctor White sets forth in his Plea, that King H. 8. did grant consorti sue Katherine, the Mannor of Bradwel, juxta mare, with certain Liberties that after her death they came unto the Crown again, which were afterwards granted by the King to Sir Walter Mildmay, with these words of tot, talia, tanta, qualia, aliquis alius unquam habuit, and from him they came to the Doctor in as large and ample manner, as the King himself, or any other had the same, by prescription, or by any other way, and shews, that Queen Katherine had those Liberties to her granted for her life; all which Liberties he claimed to have in this manner, That the Kings Attorney General hath confessed his Plea to be true, and so prayed to have allowance of the Liberties.

The Court, upon the first moving of this, said, by this which is shewed you are to have but tot, talia, tanta, as any other had; if this be to be taken generally, this may trench very much upon the Crown Land; the Queen had these Liberties for her life, they determined by her death.

It was urged for Doctor White, that he is by his grant to have, Tot, talia, tanta privilegia, libertates, as the King himself or any other ever had: The question moved to the Court, whether the Doctor, by this his grant, was to have those Liberties which Queen Katherine had: It was enforced that he should have them by the Law, because by this recital they are drawn into a particular, as much as if he had shewed such to be granted unto him, as King H. 8. had granted before, Consorti sue Katherine; this had been good; so here in this Case, this hath a reference unto the first Grant, without any recital of the particulars nominatim. And this should be so, and the reason of it appears in 20 E. 3. Fitz. tit. Avowry placit. 129. where certain Liberties were granted to the Town of Northampton, though they were repealed, yet a new Grant, with a reference to them, may be good; so here in this Case, with a reference in this manner, of tot, talia, tanta, is good, the Doctor here to have them, (as it was urged) if another had them before, though but for years.

Mich. 9 Eliz.  
&c.  
Coke 9 pars.  
f. 29. &c.

Mich. 9 Eliz. in Scaccario, ex parte Rememoratoris Thesaurarij, Rot. 163. Coke lib. Entries, fol. 534, 535. the very Case with this now in question, his verbis; In a Quo Warranto against the Earl of Pembroke, for claiming certain Liberties, pleads the same Plea as here, sets forth the first Grant to Queen Katharine, as here in this Case, with a tot, talia, tanta, there adjudged for him, and at this day he enjoys the said Liberties. Coke 9 pars fol. 29. b. 30. the Case of the Abbot De Strata Marcella, the Case there remembered, being the Grant of Queen Mary, 22 Junij, 1 Mar. unto Francis Countess de Huntington, & Katharine his Wife, where the Grant is, with a tot, talia, eadem, & hujusmodi libertates, privilegia &c. quot, qualia, quanta, & quae, &c. aut aliquis vel aliqui, &c. there resolved, that when a Charter hath a general reference to other Charters, this is as much in Law, as if all the Charters had been recited; and in this the difference will be as in 39 Eliz. B. R. The Lord Darcies Case, where Liberties were granted, and afterwards parcel of them repealed by Act of Parliament, and so become as no grant, and there tot, talia, quanta, shall not refer to those Liberties which were repealed, unless they were specially named, but no general reference to those which were repealed.

And



And so for Doctor White, the Kings Attourney-General having confessed his Plea to be true, allowance was prayed to be granted by the Court of these liberties by him thus claimed.

The whole Court inclined to be against the allowance of these liberties, thus, and in this manner claimed by Doctor White.

Haughton Justice. If this should be allowed of by the Court, this would make many new liberties in Essex: If by these general words of tot, talia & tanta, he should have all which Queen Katharine had, this may prove very hurtful to the Crown.

Dodderidge Justice agreed with him herein, tot, talia, tanta, are too general words against the King.

Mountague Chief Justice agreed with them herein, for there ought to be a certainty in reference to a thing, and to a person.

The whole Court agreed in this Case against the Doctor, that his Plea is too general, and so not good, that he should be ousted of his liberties, and Judgment to be given for the King in this Quo Warranto.

Judgment for  
the King.

Termino



# Termino Michaelis,

1 Caroli Regis, Banco Regis apud Reading.

Read Plaintiff against Holmes Defendant.

Entred Termin. Trin. 1 Caroli Regis, B. R.  
Rot. 550.

**I**n a Writ of Error to reverse a Judgment given in an Inferior Court, de Error. Havering: In an Action of Debt, upon a Bond of 6 l. conditioned for the saving and keeping of the Plaintiff harmless; Read there pleaded to the condition, That he had saved him harmless from all Actions: The Plaintiff replied, that one Thomas Holm who was to have been kept harmless by the Condition of the Bond, was arrested at the Suit of one Meek, and Imprisoned at Rumsford, & hoc paratus est verificare per Recordum, the other pleaded, that he never obtained any such Judgment.

It was urged for the Plaintiff, That this Judgment is erroneous in omnibus. (S) 1. In the Title of the Court, being (Havering at the Bower) and the Court of the Mannor, held at Rumsford, in the County of Essex, parcel of the Mannor, whereas he should have said, infra Jurisdictionem Manerij, and so are the Presidents. 2. The Court is claimed part by Prescription, and part by Charter, this ought to have been by virtue of the Kings Letters Patents, where the same is a Court of Record. 3. He ought to have set forth, that he was a Tenant and an Inhabitant, for to enable himself to sue there, which he hath not so done. And 4. Which is the main and principal Error, he shews that he was arrested and imprisoned at Rumsford: But by what Process this was so done, non constat Curia, & hoc paratus est verificare per Recordum, there being Judgment and Execution had; this is not to be put in Issue per pais, but per Recordum verificare, as appears by 6 Eliz. Dyer f. 227. upon the Statute of Apparel, 24 H. 8. and 22 Eliz. Dyer f. 368. verificare per Recordum, this is usual. 5. The Venire facias de Rumsford, no place being specified where the Action or Judgment was, for to cause the men of Rumsford for to try this. 6 Eliz. Dyer f. 227. &c.

The whole Court clear of Opinion, that the whole Record is bad, and erroneous throughout, the title insufficient to hold the Court, and the Plea bad, the Judgment



Judgment reversed per Curiam. ment erroneous, and to be reversed; they were not to try a record per pais; the whole Record is vitious and erroneous, and therefore by the Rule of the Court, Judgment was reversed.

Nota. That Banks moved an Exception to quash an Indictment; In which the several persons were involved, the Exception was, because the Addition came after the alias dictus, and so not good, by 1 E. 4. fol. 13b.

The whole Court clear of Opinion, that this is a good exception, because that the alias dictus is not his true name, but that which doth precede, as appears by 24 H. 8. Brooks Cases, fol. 9. placito 49. Brook tit. Brief placito 418. & 33 H. 8. Dyer fol. 51.

And so for this cause, by the Rule of the Court, the Indictment was quashed.

### Potter Plaintiff against Foster Defendant.

*Ejectionis firma.*

**I**n an Action of Trespass and Ejectment: The Defendant pleads in Bar, and sets forth a Lease made unto him by the Lessor of the Plaintiff; the Plaintiff replies, and doth confess, that his Lessor did make a Lease to him for years: But upon the Lease, there was a Rent reserved, with a condition to enter for non-payment of the Rent; that the Rent was behind, and that his Lessor came upon the Land, and there remained an hour before sun-setting, and there demanded his Rent and continued there demanding of this, usque ad occasum solis, and because none came to pay the Rent to him, he did then enter for non-payment of the same, according to the condition, and did lease the same unto him.

Upon this Replication, the Defendant demurred in law; and for causes of demurrer did alledge,

1. Because the Plaintiff doth not plead the Indenture for the Condition.

The Court over-ruled this, upon this difference, where to avoid a Franchise, there the same ought to be pleaded by Indenture for the Condition; but otherwise it is, where to avoid a Lease for years, being but a Chattel, as here it is in this principal Case.

2. It was urged for another cause, because here he pleads that he came upon the land, before sun-setting, and there demanded his Rent, and so continued demanding of the same, usque ad occasum solis, and doth not say, that he continued there post occasum solis.

Judgment for the Plaintiff.

The Court over-ruled this also, and that these causes of Demurrer were idle and frivolous, only for delay, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

*Peck* Plaintiff against *Methold* Defendant.

Entred Termin. Trinit. 1 Caroli Regis B. R.  
Rot. 225.

**I**n a Writ of Error to reverse a Judgment given in the Court of C. B. in an Error.  
Action upon the Case for a promise; In which Action, Methold there declared 3 Cro. 386.  
against Peck, and shewed, that whereas the said Methold, and one Marshal, by Jones 89.  
their Obligation, dated 18 Novembris, 8 Jac. were bound unto Peck in a Bond of Poph. 166.  
100 l. conditioned for the payment of 52 l. 10 s. upon the first day of March then Wioch. 112.  
next ensuing. Hutt. 73.  
Ben. 157. 162

The said Peck, afterwards (S.) 14 Septembris 15 Jac. In consideration that the said Methold, at the request of Peck, would pay unto one Plaiford, to the use of the said Peck, 52 l. and 14 s. upon the tenth day of December 15 Jac. in satisfaction of the beforesaid Debt, in the condition of the said Obligation specified, did assume and promise with the said Methold, that he the said Peck would deliver prædictum scriptum obligatorium of 100 l. unto the said Methold, cum inde requisitus esset, to be cancelled.

And shews further, that although he had paid the said 52 l. 14 s. to the said Playford, to the use of the said Peck, and at his request, upon the said tenth day of December 15 Jac. in satisfaction of the said Debt, specified in the condition of the said Obligation of 100 l. yet the said Peck, according to his promise, hath not delivered to him the said Obligation of 100 l. to be cancelled, Licet ad hoc sæpius postea requisitus fuisset: But to do this, penitus recusavit, ad dampnum querentis, 100 l. unde actio.

The Defendant Peck there pleaded, Non assumpsit modo & forma prout, upon this issue was joyned, and a Verdict given for the Plaintiff, and damages to 66 l. 13 s. 4 d. and upon this, Judgment was given for him in the C. B. for 80 l. upon which Judgment, Peck hath here in this Court brought his Writ of Error.

The Error assigned, and insisted upon, was this, (S.) That where by the Assumpsit, Peck was to deliver the Obligation unto Methold, upon request: It doth not appear, by the whole Record in the C. B. in the Action upon the Case there brought, that any request was made by Methold unto Peck, for delivery of the said Obligation to him: No allegation being made of any request made, ita quod exitus super hujusmodi requisitionem quæ est materialis pars assumptionis prædicti jungi potest: And so for this cause the Judgment in hoc is erroneous.

The Book of 40 E. 3. was objected, being in an Action of Debt upon a Bond, the Plaintiff declares, and doth not shew where this Bond was made, which makes the Declaration insufficient: But if the Defendant pleads in Bar a Release, by this, by his admittance, he hath now made the Declaration good: But as it was urged, by Hitcham the Kings Serjeant, that this is upon a Non assumpsit, and in an Action upon the Case upon a promise, the Issue of Non assumpsit doth not admit of a request duly made, as in the other Case, the release pleaded admits the Bond.

Jones Justice. In an Action upon the Case upon a promise, two things are traversable, either, quod Non assumpsit, Or, that no request was made; but if he pleads Non assumpsit, then the matter of the request, is out of doors, the same being

being now by him admitted, and so by this, he hath made the Declaration good.

Whitlock Justice. By the Plea of Non assumpsit, he hath now waived the matter of the request.

Dodderidge Justice. If one doth assume and promise to do a thing upon request, he doth now rest in safety, until the request be made unto him. If in such a Case the party brings his Action upon the Case, upon the said promise, and lays the request generally in this manner, (S.) *Licet scipius requisitus*, this request as it is laid, is formal, and not to be traversed, they go to issue upon the promise, which is found for the Plaintiff, he shall never recover any Damages, where he doth not make an express request; and doth lay this so in his pleading; so that here the request is very material, and the same also is part of the matter. And so it is, in the principal Case here, and he cannot traverse this, because it is laid in this manner, (S.) with a *Licet scipius requisitus*, which is not good, and by these words and manner of pleading, with a *Licet scipius requisitus*, the Travers to be taken to the request, is taken away; So that sometimes the request is but matter of form only, to be mentioned, and there it is sufficient to lay this generally, (S.) *Licet scipius requisitus*, and this is good. But here it is matter of substance, and therefore this is to be laid, and certainly expressed, both for the time, and also for the place, where the request was made; So that the Defendant may, if he so will, take a Travers unto it; the which he cannot do, where the same is laid generally, *Licet scipius requisitus*, and so was all the course of practice here in Pophams time.

Crew Chief Justice agreed with him herein, where the request is part of the bargain, and part of the promise, as where to pay upon request, and here in this principal Case, he is to deliver up the bond upon request made, here the request is now made a substantial part of the promise, and so the same ought to precede the delivery up of the Obligation, and the same ought to be certainly and expressly laid. It is then here to be considered, whether this matter be aided by the Statutes of Jeofails by his plea of Non assumpsit; this is not aided, but that he may well take advantage after verdict of this insufficiency in matter of Substance in the Declaration.

Jones. Where the request is requisite, there the same ought to be certainly laid; both for the time, and place where it was, otherwise, where it is not requisite, there it is sufficient, to be laid generally, with a *Licet scipius requisitus*, where the request is requisite, and no time, nor yet place, of this laid in the Declaration, there the Defendant may very well demurre to the Declaration, for this insufficiency therein; but where the Action is brought upon such a promise, and the Declaration insufficient, because no time nor place is laid therein, where and when the request was made, the Defendant here, by his own Act, may waive the taking benefit of this, by his pleading of Non assumpsit and so going to issue upon it. If in facta dicat that he did request him, and leaves out the time, and place where, the Declaration is not good, and the Defendant may for this cause demurre, but if he waives this, and pleads to Issue, upon the promise, he hath now by this made the Declaration good.

The whole Court agreed in this, that where the request is material, there the same ought to be certainly laid in the Declaration, both for the time and place, because the same is material, and matter of substance, and the Declaration not good, if this be therein omitted.

But the Court did doubt in this, and herein, did at this time, differ in opinion in this particular, whether by the pleading of Non assumpsit, and so going to issue, he hath not by this waived the taking of advantage, of any other insufficiency in the Declaration.



Declaration, for not laying of the request certainly in the Declaration, whether by his pleading, this is not by him admitted so to be.

Dodderidge & Crew Chief Justice. That this is no admittance of the same, nor any waiver of his benefit of exceptions to the Declaration.

Jones & Whitlock of a contrary opinion, that by his pleading of Non Assumpfit he hath waived this benefit. And so without any further debate at this time, it rested upon a Curia ulterius advisare vult, and so by the Rule this Case was adjourned to a further time.

Afterwards (S) Term. Hillar. 1 Car. Regis B. R. this Case was moved again. The same Error moved and insisted upon as before.

*Termin. Hillar.  
Car. Reg. B. R.  
&c.*

The Court now upon the first opening of this, were of opinion, that this is an Error apparent; because as it is here laid by this general allegation of Licet scipius requisitus, he cannot take any travers, to it; but he ought specially to have alleged the request made both for the time and place where it was made, for this ought to precede the performance of the promise, this being the essential part of the promise, otherwise it is, where the request is not so essential, there it is not traversable; and there it is sufficient to be laid, with such a general allegation, of Licet scipius requisitus, because there not traversable, nor any Issue to be taken thereon.

The Court at this time, gave a further day, to search for the President of a former Judgment cited, and for other Presidents in the point, to make this as a leading Case for the future.

It was afterwards urged for the Defendant, that this is no Error.\*

Notwithstanding the Objection made, being, because the averment here is general, with a Licet scipius requisitus, without any place or time expressed; yet this here is good, being after a Verdict, this hath made all good; as to the omitting of the place, where the Request was made; the reason enforced to make this to be an error, because there is no place for the venire facias, but this is admitted, by the Plea of Non assumpfit, like unto the Case of 18 E. 4. fol. 16, 17. where a Plea by duress admits the Bond, and so here in this Case, as it was urged.

*18 E. 4. f. 16, 17.*

It was then urged for the Plaintiff, that this Judgment is erroneous, for the Error before insisted upon; and so was it accordingly adjudged, 35 Eliz. in Stewklyes Case, in point of the Request to be certainly laid in the Declaration, but if in the Declaration the day of the Request is certainly laid, and the Defendant pleads Non assumpfit, this peradventure as it was alleged, may be good after a Verdict.

*34 Eliz. &c.*

Dodderidge. In answer to that which hath been objected, the Plea of Non assumpfit, is no admittance of a request made, and the Book remembered of 18 E. 4. doth not come unto this Case, and although the Plaintiff makes the promise, yet if no request be made, there can be no breach of promise, the promise being made to be performed upon request.

Crew Chief Justice. The request here is parcel of the bargain, and for this cause no breach can be of this promise, without a request made, and the Plaintiff in his Declaration ought precisely to lay the request made, both for the time and place, this being a real part of the promise, and therefore the same ought to be laid really to be done, for to make a good breach of the Promise.

The President which was, Termin. Pasch. 30 Eliz. in the Court of C. B. Rot. 454. Eldridges or Eastdridges Case, was a stronger Case, than this here is; there it was in the Case of an Executor, the debt due by the Testator, the Assumpfit by the Executor, who said, forbear a little, and I will pay you upon Request made. In an action upon the Case brought upon this his Assumpfit, in the Declaration, the request laid generally, with a Licet scipius requisitus; upon Non assumpfit pleaded, it was found for the Plaintiff, who had his Judgment. A writ of Error was brought, and this general allegation of the request assigned for Error, and insisted upon. In

*Termin. Pasch.  
30 Eliz. C. B.  
Rot. 454. &c.*

this Case it was clearly held, that the request ought to appear certainly to be laid in the Declaration. And for this error the Judgment was reversed.

James Case.

Another Case there was here in this Court, which was the Case of one James. In an action upon the Case brought upon a Promise for the not delivery of an Horse, which the Defendant did assume and promise to deliver to the Plaintiff at Rochester, upon request. In the Declaration the Request laid with a general allegation of *Licet sepius requisitus*, upon Non assumpsit pleaded, a verdict was found for the Plaintiff, who had his Judgment, a Writ of Error brought, and the Judgment reversed for this Error, because the request was not certainly, and specially laid in the Declaration; and so in this principal Case, this is a clear Error, and according to the former Judgments in point, the Judgment ought to be reversed.

Whitlock Justice. Admit that here he had pleaded a Release, quid inde, what would have this done? It is here to be considered, whether this request be matter of substance or not; if so, that it be matter of substance, then he cannot have his Judgment, 6 Jac. B.R. between Hill and Wall; the like Case was adjudged in a Writ of Error, and held clearly that the request ought to be certainly laid, and expressed in the Declaration, or the same not good.

6 Jac. B.R. &c.

29 Eliz. lib. Entries f. 2.

Dodderidge agreed herein. In 29 Eliz. there was the like Case also adjudged in point, vide the Book of Entries fol. 2.

Judgment reversed, per Curiam.

The whole Court agreed herein, that the Judgment given in the C. B. is clearly erroneous, for this omission in the Declaration, of laying the certain time and place, of the request made; and for this cause, by the Rule of the Court, nullo contradicente, the Judgment was reversed.

### Thompson Plaintiff against Butcher Defendant.

Action of Debt.  
Ben. 154.

**I**N an Action of Debt upon a Bill of 6 l. 13 s. 4 d. the Defendant demands Oier of the Bill. In which after this clause, (S.) In cujus rei testimonium; this clause was added, in the nature of a Proviso, *Provided nevertheless*, that the said 6 l. 13 s. 4 d. is not to be paid, until such an one hath had a recovery, in such an Action, or suit which he hath hanging against the Plaintiff, upon a Bond of 200 l. conditioned for saving harmless, or hath made an end of the same suit; and then the conclusion was, *dat' eisdem die & anno*. Upon the demand of Oier, the same was all, both the Bill and the Proviso entered of Record. To this the Defendant pleads in Bar, that no end was made of the said suit, upon the bond of 200 l. nor any recovery had, but that the same still depends; and therefore according to the Proviso, the said 6 l. 13 s. 4 d. demanded by the Bill, is not to be paid, the Plaintiff having commenced his suit for this, before his time limited, by the Proviso, to have payment made of this.

The Plaintiff by Replication shews, that an end was made of the said suit, upon the Obligation of 200 l. by a composition of 20 l. given and accepted in full satisfaction, and discharge of the said suit, in *plenam satisfactionem actionis prædictæ*, and that so the 6 l. 13 s. 4 d. now demanded, is to be paid unto him. The Defendant by Rejoinder pleads, that no such end was made of the said suit, *prout quer. and Alue* joined, upon this a trial had, and a Verdict for the Plaintiff.

It was moved for the Defendant in arrest of Judgment, that the Plaintiff ought not to have his Judgment, because out of this matter of fact, thus found for the Plaintiff, (S) the end of the said suit, upon the Obligation for payment of 200 l. to be by composition of 20 l. given in satisfaction, and discharge of this; out of this matter

matter of fact, found for the Plaintiff, ariseth this matter in Law, (as it was urged) which makes against the Plaintiff, so as he cannot have Judgment, and this is, the giving of 20 l. in satisfaction of the Obligation of 200 l. which in Law is not good, for that 20 l. cannot be a satisfaction for 200 l. For the Plaintiff to have his Judgment, It was urged, that the 20 l. is not given in satisfaction of 200 l. which cannot so be by law, as it must be agreed; but the 20 l. by composition was given in satisfaction, and discharge of the said suit upon the bond of 200 l. and that this is good, and the issue was only whether such an end was made by composition; and a great difference there will be, where 20 l. is pleaded to be paid in satisfaction of 200 l. (which cannot be good) for that 200 l. cannot so be satisfied, and where the same is pleaded, to be given in satisfaction of a suit, and of an Action depending for the 200 l. this is good, and may so well be, and so is the Case here; for the substance of the Plea here, is the composition, and not the payment of the money; and the Jury have given a Verdict for the Plaintiff, and have found the said Composition to be, as the same was pleaded by the Plaintiff. Coke 5 pars fo. 43. Nichols Case. Debt brought upon a single Bill, the Defendant pleads payment, without an acquittance, upon this they went to issue, and found for the Plaintiff, there adjudged, although payment without an acquittance, is no Plea, and so an Issue joyned upon a thing not material; for if he pays without an acquittance, the single Bill still remains in force; but because an Issue was there joyned, upon an affirmative, and a negative, and found for the Plaintiff, this adjudged to be aided by the Statutes of 32 H. 8. and of 18 Eliz. and there Judgment was given for the Plaintiff, and this affirmed in a Writ of Error.

Coke 5 pars  
f. 43. in Nichols  
Case.

Stat. of 32 H.  
8. & 18 Eliz.

1. Whitlock Justice. Here the 20 l. was given in plenam satisfactionem actionis predictæ, and not in satisfaction of the 200 l. and notwithstanding any thing which appears in this Record, he may still have remedy for the 200 l. the Plaintiff here ought to have his Judgment, according to the Verdict given for him.

2. Jones Justice agreed herein, that Judgment ought to be given for the Plaintiff. At this Proviso here, be no condition nor yet any parcel of the Bill; then it is very clear against the Defendant; for then they are at Issue upon a void thing, and there is then no difference between this Case and Nichols Case, before remembred, and here aided by the Statute of Jeofails, after a Verdict, as there it was, because the Issue did arise upon a void matter. But if the Proviso be parcel of the Bill, or if it be in the nature of a condition, there it may be the more doubtful, by 40 E. 3. f. 2. an Obligation without this clause, In cujus rei testimonium sigillum meum apposui, yet this is good; here the Proviso shews, when the 6 l. 13 s. 4 d. is to be paid, and if it be no parcel of the Bill, then the same is in the nature of a Defeasance, or Condition; if a Condition, then the Bar is good, and Issue good, and found for the Plaintiff and so good, that there ought to be a recovery, in such a suit in B.R. or an end made of this before the money demanded to be paid, and the 20 l. here given, was to have an end of the said suit, and so it was ended.

40 E. 3. f. 2.

In Case of an obligation, it is clear, that after the day, on which it becomes due to be paid, acceptance of a lesser sum, is no satisfaction of this in Law; otherwise, where it is before the day; but here the 20 l. is not given in satisfaction of the Bond of 200 l. but the same is given in satisfaction and discharge of the suit, and so this Proviso hath relation unto a Condition, the 6 l. 13 s. 4 d. was due here to be paid to the Plaintiff; his Action well brought for the same, and having a Verdict, Judgment ought to be given for the Plaintiff.

3. Dodderidge Justice. In this Case Judgment ought to be given for the Plaintiff.

1. It is here to be considered, whether this Proviso be parcel of the Bill, or as a Condition to the same annexed, or as but a vain and idle clause inserted, upon the whole matter; if be part of the Bill then it is not idle, because this tends to the matter



matter; appoints a day and time of payment, and hath some dependency upon this which goes before; and therefore this ought to be, either parcel of the deed, or a condition unto this annexed.

Object. An Objection hath been made, that it is not parcel, because it comes in after this Clause, *In cujus rei testimonium*.

Resp. This is Reason, because the said words are not always of necessity, to make the conclusion of the Deed, for a Deed is good, dated without the Clause, *In cujus rei testimonium*, if it be sealed, the same is good, and the said clause is not of such force, as to make the Deed void, if it be wanting; for if the words in the deed contained, are sufficient to bind him, and this is by him sealed and delivered, this is good and sufficient. So that this Proviso may be part of the deed. But if it be no part of the deed, yet the same is a Clause pertinent to the deed; if it be put in, and subscribed to the deed before the sealing of this, it is then part of the deed, if it be after the sealing, yet it may be as a Condition annexed to the Deed.

Object. It hath been objected, that he did not demand Oyer of the condition.

Resp. As to this, the same is not requisite. If all be entered of Record, this is good, although the same not demanded, this being only for Information of the Court, and of the party; so that it is not material at all, whether the same be parcel of the Will, or a condition annexed to the deed; and so it is pertinent to the deed, for this sets down, and puts in certain the day of payment, at which time the same ought to be paid, and before which time not.

Object. It hath been further objected, that 20 l. paid, where 200 l. was due by the Obligation, and this 20 l. given and paid in satisfaction of 200 l. which by the Law cannot be.

Resp. As to this, by this, there was an end made of the said suit; if Issue had been taken here, upon the point of satisfaction, peradventure, this would not then have aided him; but the issue here tried was, whether such an end was made of the said suit, as by the Plaintiff in his pleading was alledged to be, and the Jury hath found this matter for the Plaintiff. Also if the Law be so, that 20 l. cannot be paid, in satisfaction of 200 l. yet 20 l. may well be paid to end a suit for 200 l. and this may well be so done by the Law, and this is the matter in issue here between the parties, which the Jury hath found for the Plaintiff; and so according to the verdict, Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice agreed herein, as the issue here is joyned, and found, and so all to be taken together, dated as aforesaid, the issue and verdict; and by the Record it appears, that this Clause or Proviso is parcel of the bill, the 6 l. 13 s. 4 d. to be paid, either upon the recovery in the Action, or upon an end made of the said suit; this put in Issue to be tried by the Jury; the end alledged to be made, by payment of 20 l. for to end the suit, for the 200 l. It must be agreed, that after the day that the same is due, 20 l. cannot be paid in satisfaction of 200 l. but here it is not so, the 20 l. being paid, to end the suit for 200 l. and this is good; and before the day that the same was due, 20 l. may be well given, and so accepted of, and good in Law, for to satisfy 100 l. before the day that the same was due, or this may well end a suit for 100 l. the Proviso here, is part of the Will, for this doth express the day and time of payment of the 6 l. 13 s. 4 d.

Coke 5 pars Nichols Case before mentioned, is a very strong Case, payment there pleaded upon a single bill, without an acquittance, this not good, but going to issue upon this, and verdict found for the Plaintiff, this is now made good, and aided by the Statutes of Jeofails. And so the Plaintiff here ought to have his Judgment.

The whole Court clear of opinion for the Plaintiff, and accordingly, by the Court Judgment was given for the Plaintiff.

Coke 1 pars  
Nichols Case.

Judgment for  
the Plaintiff  
per Curiam.

Parret

*Parret Plaintiff against Parret  
Defendant.*

**I**N an Action upon the Case brought for scandalous words spoken by the Defendant of the Plaintiff, The words were laid to be these, (S.) Thou art a Sheep-stealer, upon Non culp. pleaded, a Trial was had at Gloucester Assizes ult. and a verdict given for the Plaintiff. Bridgeman Serjeant, moved the Court for the Defendant, in Arrest of Judgment, that the words were not actionable, being too general, and doth not lay that he said, that he had stole Sheep in fact. Words.  
Ben. 154.

For the Plaintiff it was urged by Trotman, that the words are actionable, and to this purpose it was here adjudged; In an Action upon the Case for these words. (S) Thou art an Horse-stealer, and it was here adjudged, that the Action did well lie for these words; being upon the matter (as it was urged) all one, with this present Case.

The whole Court agreed clearly, that in this principal Case, the words are scandalous, and well actionable; and therefore by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for  
the Plaintiff,  
per Curiam.

*Whiteman Plaintiff against Hawkins, & Uxor  
Defendants.*

Entred Termin. Trin. 1 Caroli Regis, B. R.  
Rot. no 16.

**I**N an Action of Trespass, Quare clausum fregit, pedibus ambulando & tres Tassas Anglice, Sheafs of Corn did take, adtunc & ibidem, existens, and upon Non culp. pleaded, a verdict found for the Plaintiff. It was moved in arrest of Judgment, that the Declaration was not good, being adtunc & ibidem existens, but in the Declaration, where he lays the taking of the three Sheafs, omits these words (S) ipsius querentis, so that it is not set forth in the Declaration, whose goods these were, which were thus taken away, and so for this omission, the Declaration is bad, and uncertain. Trespass.

Dodderidge Justice. In 3 E. 4. fol. 21. An Action of Debt brought against the Priores for salary, and declares, that he was retained by her Predecessor, but doth not shew in his Declaration who it was that retained him, and therefore it was there held bad and uncertain, and for this cause abated, for this is not supplied, and so is the Case in Plowdens Commentaries fol. 84. in Partridge and Stranges Case, and so here in this Case. 3 E. 4. fol. 21.

The whole Court agreed herein, that for this omission the Declaration here is not good; and therefore the Rule of the Court was, Quod querens nil capiat per billam. Judgment quod  
querens nil ca-  
piat per billam.

Gilberd

Gilbert Plaintiff against Rodde  
Defendant.

Ben. 155.

**I**n an Action upon the Case for scandalous words, spoken by the Defendant, of the Plaintiff, being these, (S.) Thou art a false forsworne Knave, and thou hast been Indicted for Perjury by 12 Men, and hast compounded for the same; upon Non culp. pleaded, a verdict was given for the Plaintiff.

It was moved for the Defendant, in Arrest of Judgment, that these words are not actionable, being too general, and an Indictment is but an Accusation, and the same to be compounded upon a just cause.

Object. Dodderidge Justice. As to the Objection made, that an Indictment is but an Accusation.

Resp. It is such an Accusation, as it is the voice of the Country, the representing the Body of the Country.

Also for another reason, an Indictment is an Accusation of Record, so that lay all together, an Indictment is an Accusation, and such an Accusation which is the voice of the Country, and also the same is an Accusation of Record; the Indictment being the Kings Declaration, and so scandalous; as to the words following, they make the matter stronger, that the words are actionable, (being) and hast compounded for the same: If he had said, and hast fled the Country for the same, these words had been well actionable; here the words by him spoken do amount unto as much, for he said, that he had compounded for the same, which is an implied acknowledgment that he was guilty of this Crime: and so lay all the words together, that he was indicted of Perjury, and had compounded for this, this is a very great scandal unto him, and for this cause these words are well actionable, the Indictment being an Accusation of Record.

If one saith, that such an one hath been arrested for Felony, and hath fled the Country for it, the words are scandalous, for upon his flying, an inquiry shall be made of his goods, and therefore actionable: And so in this principal Case, the words as they are laid, and taken altogether, are very scandalous, and well actionable, and so the Plaintiff ought to have his Judgment.

Jones Justice. The words here are well actionable: If one saith of another, that he is forsworne, these words are not actionable; but if the words go further, and saith, in such a Court, there these words are actionable.

If one saith of another, that he is Indicted, no Action lieth for these words; but if he saith, that he was Indicted and Convicted, for these words an Action well lieth: In this principal case the words are scandalous and actionable, and therefore the Plaintiff ought to have his Judgment.

Whitlock Justice agreed herein: If these words shall be severed and laid by themselves, no Action will then lie for them; but they being all of them conjoyned and laid together, are scandalous and well actionable; here for these words, (S.) Thou art forsworn, no Action lieth; but here he proceeds in his words, and thereby he interprets his meaning, and hath been Indicted for Perjury, and hast compounded for this, here these words laid, and taken altogether, are scandalous and well actionable, for now by these his subsequent words, he shews his meaning, that he intended that he was forsworn in a Judicial Court, and that he was Indicted for it.

This the matter of charge laid upon him by the other, and this cannot be taken away, but remains a blot and scar, and cannot be taken away but by matter of Record,



Record, (S) by Tryal indicted for this; the next matter is, and had compounded for this, this is a confession of the Fact, so that these words laid altogether are scandalous, and well actionable, and therefore the Plaintiff ought to have his Judgment.

The whole Court agreed that the words are scandalous, and well actionable, and that Judgment ought to be given for the Plaintiff: The reasons of this their Judgment being, because an Indictment is an accusation of Record: The same being the Kings Declaration, and the voice of the Country, the Jury representing the Body of the County, and so scandalous; and saying further, and hath compounded for this, this is a confession of the matter of the Indictment to be true, for *fatetur facinus qui judicium fugit*, so the words are scandalous and well actionable, and therefore the Rule of the Court was, *Quod judicium intretur pro querente*.

Judgment for  
the Plaintiff,  
&c.

*Blackstone Plaintiff, against Martin and Uxor  
Defendants.*

Entred Termin. Trin. 1 Car. B. R.

Rot. 773.

**I**n a Scire facias, in the nature of an Audita querela, the Plaintiff shews that 3 Jac. Sir William Blackston being seised of Land in the Pannoz of D. and of other Lands, and he being so seised, 3 Jac. he acknowledged, a Statute of 400 l. that he had part of the Land subject to the Execution, and was seised of it, which was taken in Execution, there being other Lands in the hands and possession of the Defendants, subject to the said Execution, and not extended; upon this the Scire facias, here brought in the nature of an Audita querela, for to be relieved against them by way of contribution; this Writ directed to the Sheriff of Suffolk, the Plaintiff being a Feoffee of Sir William Blackstone, and prays to be restored unto his Land, and to the Profits of the same, and to all which he hath lost, by this extent thus taken out, and laid upon his Land: The parties were at Issue upon the seisin of the Plaintiff, and a Verdict found for the Plaintiff.

A Scire facias.  
Latch. 3. 122.  
274.  
Benl. 161.  
Jones Rep 82,  
90.

Bankes and Davies moved divers Exceptions in Arrest of Judgment, and shewed that there was a former Scire facias in this Cause, and that after Verdict, Judgment was Arrested, because the Trial was mistaken, for having this Writ out of the Chancery, and being at Issue upon the seisin, and this sent down out of the Chancery to the Bishoprick of Durham, to be tried; they failed in this, and therefore after Verdict, Judgment was arrested, because the same ought to have been first entred in this Court, the Chancellor to come with the Record, and this Court to have awarded the Trial; upon this a new Scire facias now is brought, and in this a Trial hath been at the last Assizes by default; for matter now in Arrest of Judgment, it was urged, that it appears here by the Plaintiffs own shewing, that the Statute was acknowledged 3 Jac. and his Land extended, that he sued forth a Scire facias, in the nature of an Audita querela; by which it doth not appear that he was Tenant of this, and of other Land, at the time of the Execution sued; but he shews, that he was a Feoffee of Sir William Blackstone the Conusor, and so prays by this to be relieved; whereas he ought to have shewed, that he was Tenant at the time of the Execution, as appears by 22 E. 3. Fitz. tit. Execution, placito 137. No Contribution to be for the party himself, which acknowledged

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the Statute, (as it was urged) not yet for his Feoffee, who shall not be in better case than his Feoffor.

And by 27 H. 6. Fitz. Execution, placito 135. the Heir is not charged as Heir, but principally as terre Tenant, and the Heir is not to have Contribution, as appears Coke 3 pars, in Sir William Harberts Case.

Coke 3 pars,  
&c.

To the Exceptions taken, answer was made by Trotman and Bridgeman Serjeants for the Plaintiff, because he saith that he was tenens, and it doth not appear quando tenens, for that if he was not tenens at the time of the extent, he can then have no Scire facias; this is in a Writ, & dicitur breve, quia rem breviter enarrat, like unto the Writ of Monstraverunt, & Quod permittat, in which it is not needful to shew and make expression of all Circumstances, no more here in this; but for to take this Exception, the party now comes here too late, for he hath appeared to the Scire facias, and so by this he hath confessed him to be tenens, like unto the Case, 17 Eliz. Dyer, fol. 341. where the Demandant in a Formedon is estopped, by reason of his Writ against the Tenants, he is estopped to say they are not Tenants; so here by his appearance to the Scire facias, he is estopped to say he was not tenens, by 21 H. 7. fol. 7. & Fitz. Nat. Brev. fol. 105, the Audita querela is in the nature of a complaint in the Chancery, by 16 Eliz. Dyer, fol. 332. this is well returned in the Chancery, if an Audita querela, and so if a Scire facias.

21 H. 7. f. 7. &c.

It was further urged, that upon all the parts of the Writ taken and laid together, it shall be taken and intended that he was tenens tempore brevis. This first begins, ex gravi querela, this shall so be intended, that he was Tenant at the time of the Writ, otherwise he had no cause to complain; and Writs are so called, because they are penned briefly to contain the substance of the matter, and this is sufficient, 5 E. 3. f. 150. new Print, and f. 197. old Print.

Termin. Trin. Case 23. In an Action of Trespass, for taking of his Cattel, and detaining of them, there this Rule is put, (S) When one word may have a double intendment, (S) one according to the Law, and another against the Law, that intendment shall be taken which is according to the Law, And this by a reasonable intendment.

It was further urged, that here in this Case the Execution, fuit minus iuste & ad damnum of the Plaintiff, & contra legem terræ, so that by this conclusion, he shall be intended to be a Tenant at the time of the Execution sued.

1. Whitlock Justice. The Writ is, Tenentes narrant, the point is, how this shall be intended, if to be understood, that he which is only Tenant at the time of the Writ, and not pars gravata; Whether we are to intend this to be so; this we are not to do: If he be not prejudiced by this, what remedy is he to have? The reason of the Audita querela, because the burthen ought to be equally laid, (S) all to be charged together, which is not pursued here, but laid upon him alone.

This appears by the Record to be his grief, because that out of this charge some Land is omitted, and his Land taken, and this is the cause here of his grief and complaint; tenens, this is his title, because the title of the Land, and all the subsequent part of the Record, shews and sets forth his grief: The presidents are so, and so the Scire facias is but monitio: No Essoyn lieth in this, as in other Actions: in this Non tenure shall not be pleaded: No protection shall be granted in this: If brought by an Executor, he shall not in this be enforced to shew Quando, nec ubi iudicium fuit, this being but only monitio, a warning.

And this is the means to have the other cause to shew if he can, why he should not have his Judgment, and the effect of the same: And so by this, he puts all the cause upon the other side to defend: He only shews by his Writ, that he is a person able to have this; he demands nothing at all by it, this being only a monition

factum

faction to call in the other party for to answer, and he is not to shew in this Writ all the whole matter in such precise certainty, as it hath been objected.

As to the matter objected of discontinuance, there is no discontinuance at all in the Case; for upon view of the Record this is well aided, and so in this Case Judgment ought to be given for the Plaintiff.

2. Jones Justice agreed herein, that the Plaintiff ought to have his Judgment.

Two exceptions have been taken, which are only material.

As to the continuance, a general continuance, coram domino rege, but here it is dicto, &c. yet this is good.

As to the Issue, the Chancery might make the award not to proceed further there, but to deliver the Record in B. R.

As to the two exceptions taken; the Presidents are to have a Scire facias in the Chancery, or an Audita querela in B. R. or in C. B. as one of the Prothonotaries there, 20 years since in a Cause did inform me, and then they shewed Presidents to the Lord Chancellor to warrant this, F. N. B. and 29 E. 3. a Scire facias lieth where one Conussee is charged, and others omitted; the reason of this, because the Court which hath power to grant Execution, might have granted a Scire facias.

As to the other point, 7 R. 2. Fitz. Admeasurement de Dower, placito 4. 7 R. 2. Fitz. &c. Guardian in Chivalry, the second shall not have this, where the Guardian assigns over: It appears that he was tenens, he may come to the Land since the extent, yet it shall be good upon this reason, that a Scire facias and an Audita querela, ought not to be so certain as a Declaration, being only a Writ to be discharged; where the party saith tenens, it shall be intended of freehold, at the least; It is also here said ad damnum, which cannot be to his damage, if he was not tenens at the time of the extent, and so upon the whole matter, as this Case is, Judgment ought to be given for the Plaintiff.

3. Dodderidge Justice. It is here alleged that he was Tenant of the Land, and that the Execution is to his Chief, and his Prayers is to be restored to the Profits of the Land, from the time of the liberate, whether this Writ be good, or not, is the question.

The second Point, Whether he shall have a Scire facias, or an Audita querela.

A Conusor of a Statute shall have a Scire facias, 4 H. 8. Dyer, and there an old Book cited; here this is a special Scire facias, for by this he will not only have the possession, but would also be restored unto all the mean profits, at the time of the liberate; and it appears not by the Record, that he was then Tenant.

This Case cannot be taken by Intendment, for his prayer is to be restored to the Profits of the Land, from the time of the liberate; and to have this, he ought to make it appear upon the Record that he was then Tenant, otherwise he cannot have any benefit thereby, and this he hath not here so done; and it shall be a very strange intendment, for to intend one to be Tenant of the Land, for any longer time than he himself saith that he is Tenant.

Intendments by the Law shall be of probabilities, as for to intend a thing, in mitiorem partem; but it is very improbable, that he which is Tenant this day, should be intended to be Tenant, long time before that he himself saith he was Tenant, he hath something to do with the Land; he saith here, that he was Tenant at the time of the Scire facias.

As to the other point, Whether he shall have a Scire facias, or an Audita querela: This Scire facias here is special in the nature of an Audita querela. This Scire facias is good and sufficient, for now the same is returned in Chancery, and is a Record of the Chancery, and therefore he may well have a Scire facias, the Judge



ment being there in this Case, upon the Statute of 23 H. 8. when the Record is there in the Chancery.

As to the Return, this is well there in the Chancery, for it ought to be to the same Court where he had received it.

And there is no discontinuance here in the Case, in Termin. Hillar. he prays an Impar lance, coram dicto domino rege, until Termin. Pasch. this is true, & ei conceditur, so the Entry was; this is full, though the King died before the day given; this is no discontinuance, petit licentiam interloquendi, dicto domino regi.

The sole doubt in the Case, because he saith that he was tenens at the time of the Scire facias, and by his Prayer he would be restored to the Profits, from the time of the liberate; and so at this time, for this cause Judgment ought to be given against the Plaintiff.

Crew Chief Justice. The Record is coram domino rege in Cancellaria, a Chancery Record, est querela, a complaint.

As to the Objection made, because he doth not say that he was Tenant at the time of the liberate; it is good to see the presidents in this how they are: The Plaintiff here complains that his Land was taken in execution, by this it is to be inferred, that he was in possession at the time of the liberate; this the ground of his complaint, that the Conusor had more Land not extended, and his Land only extended; also he is here pars gravata, and it is here laid to be done, contra legem terræ; if his Land was not so taken and extended, he had no cause then to complain, and this is a very strong inference out of the Record, that this was his Land: And the Defendant here admits him to be Tenant, and that he is the person who hath cause to complain; but he saith, that he hath not any such Land; it appears here by the Verdict, that the Land was omitted, he ought to have the possession, otherwise it could not be taken away from him, 16 Eliz. Dyer, it appeareth where he is to have a Scire facias, and where an Audita querela, when the Record is here, by 21 H. 7. it is here fixed; for the principal point, because he saith that he was tenens generally; as to this without any further debate, at this time it rested upon a Curia advisare vult, and so by the rule of the Court, this Case was adjourned to a further time, for the Court to be better satisfied herein; but by Crew Chief Justice, the Plaintiff ought to have his Judgment.

Termin. Hillar.  
1 Car. B. R. &c.

Afterwards, (S) Termin. Hillar. 1 Car. B. R. this matter was moved again, and argued by the Counsel on both sides, and by all the Judges.

1. Whitlock Justice. This Writ is a Scire facias, in which the Plaintiff shews that he is seised of the Messuage and Land, at the time of the Execution; the Defendant ought to have shewed, that he was not tenens, he admits him to be tenens, and that he is the party grieved, but takes Issue, that Blackstone was not seised of the Land, tempore executionis: A Scire facias differs very much from Declarations, all things not to be so particularized in a Scire facias, and this doth accord with the Presidents; here the Defendant hath taken Issue upon the seisin at the time of the Recognizance acknowledged: The nature of the Scire facias is to turn all upon the Defendant, as appears by 34 Astar. In this Case, forasmuch as the Defendant hath admitted the Plaintiff to be the party grieved, and a Verdict is found for the Plaintiff, and no material matter shewed in Arrest of Judgment, Judgment ought therefore to be given for the Plaintiff.

Jones Justice. In this Case the Plaintiff ought to have his Judgment.

As to the Presidents which have been shewed, they are of no great force and avail in this Case: He to whom the Conusor passeth over his Land, shall be subject to the Execution: If one be seised of two Acres of Land, acknowledgeth a Statute, afterwards he makes two several Feoffments unto two Men; the Land of one of them is extended, he makes a Feoffment over, the title of Action shall not be transferred over, or translated, so it is of Admeasurement of Dower.

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As to the Objection made, because it doth not appear that he was Tenant at the time of the liberate, agreed, if the extent be, and before the liberate, he makes a Feoffment over, his Feoffee shall have an Audita querela, he hath no cause to complain until the liberate, and by this the wrong doth begin.

As to the presidents shewed, they come not home to this Case in question; here when he saith that he was tenens præmissorum, this is but in the nature of a Will in Chancery, for to have a Commission, and in this, such precise certainty in every respect is not requisite to be, as in Declarations; It shall be intended that he was Tenant, until the contrary be shewed by the other party; the constant course hath been so, and this is not to be altered, and there is very much equity in this Case for the Plaintiff, and therefore he ought to have his Judgment.

3. Dodderidge Justice agreed now in opinion with them for the Plaintiff.

The matter rests only upon this word, (S) (tenens) and doth not say quando, Whether it shall be intended that he was tenens at the time of the Execution sued, and so a party grieved by the Execution; it is sufficient for him to say, that he was Tenant at the time of the first Writ purchased, then the Execution was sued out, and the same to his grief: I agree that where a lawful Execution is had against the Co-nusor himself, that he shall not have an Audita querela, here it appears by the Writ, that he was Tenant at the time of the first Writ, and he shall be intended still so to continue Tenant, if the contrary be not shewed, (as here it is not) and so he being the party grieved, had just cause of complaint; and having a Verdict found for him, upon the matter put in Issue, and nothing material moved in Arrest of Judgment, therefore in this Case Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice. It is here said, that he was tenens Messuagij, and of the capital Messuage of Blackstones, and that Martin procured one of them to be extended minus iuste & contra legem terræ, Blackstone upon this brings this gravis querela.

The Objection which hath been made is of great force, if I cannot deliver my self of this by example and president, the Objection being, because he doth not shew quando tenens, Whether at the time of the Execution, if extended in the hands of the Feoffor, his Feoffee shall not have an Audita querela. It doth not appear here when the liberate was sued out.

It is objected that he was not Tenant at the time, but, lay all here together, and it doth well and sufficiently appear, Blackstone here hath brought this Action; and it doth not appear that he was Tenant at the time of the liberate, as it hath been objected: But this doth well appear to be so, for he saith that this was to his prejudice, & minus iuste, and prays to have the profits of his Land to him delivered from the time of the liberate: the Defendant to this might have answered, and said, that he was not then Tenant; he hath not so done, but the contrary, for he hath admitted him to be Tenant, and that the Land was taken from him in Execution; all this is by him admitted, and this makes for the Plaintiff; and because that the Defendant himself hath admitted of this, I will not now make this a question, whether he was Tenant at the time of the liberate, or not. As to the Presidents, I have seen divers of them, and I have also examined the course and usage, and I do find the constant course to be so, as here it is in this Case; one president shewed, which was 33 Eliz. Morley against Lovet, there it was shewed how he was Tenant, and that he was Tenant at the time of the liberate, and all this there shewed in certain, 41 Eliz. Dutred against Toppe, in an Audita querela against an Assignee, shews the seisin, & adhuc seisus existens: But in modern times, (S) in the time of King James, all the Presidents run according to the President of this Case now here in question before us: And so upon the whole matter, Judgment in this Case ought to be given for the Plaintiff. And so according to this resolution of the whole Court, by the rule of the Court Judgment was given, and so entered for the Plaintiff.

33 Eliz. &c.

Judgment for the Plaintiff.

## Wrothmeal Plaintiff, against Gill Defendant.

A Prohibition.

**B**anks moved the Court for a Prohibition to the Ecclesiastical Court, the ground and suggestion for to have a Prohibition; he did gather and collect out of the Body of the Libel, because there the Parson libelling for Tithes, sets forth nothing at all to enable him to have the Tithes, being only laid that he was the Curate of such a Church; and doth not lay that he was admitted, instituted and inducted, for that before induction, no Freehold vests in him, to intitle him to have the Tithes, for Curatus non habet titulum, and by 32 H. 6. fol. 28. & 33 H. 6. f. 24. he can have and maintain no Action, neither a Spoliation, nor trespass before his Induction; for before this he is not intituled to the Tithes, and a release by him made before this, is not good, as appears by 11 H. 4. fol. 3. Commentaries, in Hare and Bickleys Case.

Dodderidge Justice. By Institution, habet curam animarum, the words of Institution being, Instituo te habere curam animarum, curam tuam, & meam, so that Curatus is a Vicar, admitted and instituted, and the Law takes notice of a Curate, as appears by the Statute of 35 Eliz. upon a motion there made by the Curate, as mention is made in the said Statute for matter of Recusancy and Absuration; and so Curatus, this implies a Parson instituted; here by the Libel it appears that the Parishes name is Burton Cumberd, and it is mentioned that he is Curatus Ecclesie, rite & legitime, admissus & legitime investitus, and so good and sufficient, and by the Canon Law investitus is taken for inductus, and makes all the matter plain, and as if he had said, Curatus admissus & inductus, and this is good.

Whitlock Justice agreed herein, if he had said, rite & legitime inductus, this is good; here it is investitus, and this is all one, & Curatus investitus & inductus, implies institutus; Curatus implies this, quia ad curam animarum, and so this is good and sufficient.

Crew Chief Justice agreed with them herein, that the suggestion is good.

Dodderidge. You have not the word, personated Rector.

The whole Court agreed in this, that if the truth of the Case be so, that he is but stipendiarius, a meer stipendary Parson, then this to be pleaded there, and if they do refuse this Plea, then this shall be a good cause to move for a Prohibition.

Banks made answer, that the truth of the Case is, that this is an Impropriation, and that there is neither Parson nor yet Vicar there, and so the suggestion is.

Dodderidge. This is not to be, for then this suggestion shall be contrary to the Libel; but plead your matter there, as the truth of the Case is, and then upon their refusal there to give an allowance of this, then you may move for a Prohibition.

And so without any further debate of this matter, the same rested upon this former direction given by the Court unto the Plaintiff in the Prohibition to be by him pursued: No Prohibition granted, but that they may there proceed.

Prohibition  
denied.

Cranfield



*Cransfield* Plaintiff, against *Turnor* and *Collins*.  
Defendants.

**I**n an Action of Trespass and Ejectment: The award upon the Roll was against both the Defendants, they both plead Non culp. The first Process, (S) the Habeas Corpora against them both, but the Venire facias against one of them only, one of them being only named in this, they proceeded to a Tryal, and a Verdict, for the Plaintiff against both the Defendants.

Crawley Serjeant moved to have this amended, after a Writ of Error brought, and this omission assigned for Error.

Curia. The award upon the Roll is well, and this is the ground for the Venire facias which is made but against one, and so the same is mistaken, and doth vary from that which is the ground of it: The Distringas is well against them both.

Dodderidge Justice. The Error of the Clerk is amendable, according to the Roll: where this is mistaken, and is to be made agreeable unto that which is the ground of all, (S) The award upon the Plea Roll, and this is plain; so here in this Case, because by the Plea Roll it is so be inter partes prædictas: The Venire facias being only against one of them, this is to be amended, and to be made consonant and agreeable with the Plea Roll.

Curia. The Venire facias is well amendable where it is mistaken, and to be made agreeable with the Plea Roll, and this being after Verdict, as this Case here is, the Venire facias is to be amended, and made to accord with the award upon the Plea Roll; this being the ground to direct all the subsequent proceedings, and this omission here is but vitium Clerici, who ought to have made the Venire facias against both the Defendants, and not against one of them alone, as here he hath done it, and therefore this is to be amended.

The whole Court agreed herein, and therefore by the Rule of the Court the same was amended, and a Superfedeas granted to stay the former Superfedeas, had upon the Writ of Error, quia improvide emanavit, and the party to proceed in his Writ of Error, and to assign his Errors without delay.

*Cable* Plaintiff, against *Rogers* Defendant.

**I**n an Action upon the Case for a Promise, for not performing the award of such to whom the Plaintiff and Defendant had submitted themselves: The submission by the Record, was laid to be in this manner, (S) That whereas divers Quarrels and Suits were between the Plaintiff and the Defendant: for and concerning Debts, Trespasses and Injuries: The submission was of all Debts, Trespasses and Injuries, the Assumpsit was mutual on either part, to perform the award which the Arbitrators should make.

They awarded Pony, (S) twenty Mark to be paid by the Defendant to the Plaintiff in this manner, (S) the moiety thereof in hand, presently upon the award made, and the other moiety within six months next after the date of the award, and releases.

An Action upon the Case for a promise.

releases to be made by the Plaintiff: For not payment of the Money according to the award, an Action upon the Case was brought by the Plaintiff against the Defendant, and upon Non assumpsit pleaded, a Verdict was given for the Plaintiff.

Crawley Serjeant, moved the Court for the Defendant in Arrest of Judgment, and offered two Exceptions to the award made, (S.)

1. They have made their award for Money to be paid by the Defendant, and releases to be made of all Actions, Debts, Duties, Trespasses and Demands, so that their award made, to have a release made of Duties and Demands, is more than is contained in the submission to them, and therefore their award not warranted by the submission, but exceeding the same, and so a void award.

2. They have awarded payment of the Money, to be made within such a time after the date of the award, which was made the same day of the submission.

It was urged for the Plaintiff that the award was good, for the word Injury, is a word of a large extent, and comprehends all Wrongs and Injuries, be it in Debt, for the non-payment, or in Detinue, for detaining of, &c.

Dodderidge Justice. The award here is good, and well made, and that according to the submission.

As to the first Exception taken, that the award is larger than the submission to the Arbitrators, being of all Trespasses and other Injuries, and the award is here made of all Debts, Duties, Trespasses: This doth not exceed the submission, for the word Injury is a general and large word, and comprehends in it self all manner of wrongs, be it in Debt, in not paying of it, or in Detinue, in the detaining of Rent, this is an Injury: Injuria & damnum are the two grounds for the having all Actions, and without these, no Action lieth: If there be damnum absque injuria, or injuria absque damno, no Action lieth, but where there is Injury, Injuria & damnum, and so both of them do run together, there an Action well lieth: Also this word Injury, in it self comprehends all Demands: The words of the submission, comprehends all wrong, which one Man by any way may do unto another, being an Injury, and includes in it all matters of Equity, and also of Law, and so the award and the submission do well accord.

The second matter objected against this award, that here they have awarded Money to be paid within such a time, after the date of the award made.

As to this, sometimes by construction this goes to the making of the award, and this is not made before it be delivered up; the date of the award is to be construed, the giving up or making of the award; where it is referred to a thing not to be by writing compulsory, for the submission here doth not bind to have this award in writing, an award not made, but by their delivery of the same, and if this be referred to a thing not to be by writing; as an award which may well be made by words, as so refer to the date, as a do, das, datum, being as much as to say, given up, which is at the time of the award made or given up, although without any date; for if no date, then it is to be taken from the time of the delivery of the same, for a Deed is good without any date, by the delivery of the same, and so here it shall be taken to be at the time of the delivery, because by the submission they are not bound to make their award in writing; and so in this Case, upon the whole matter, here is a good award made, and well pursuing the submission, and for the non-performance of which the Plaintiff here had good cause of Action, and the Verdict well given for him, and so he ought to have his Judgment.

Jones Justice agreed herein: But the award here is more large than the submission; and out of this, it is true, as hath been said, that an Injury contains in it all which is contra jus: If one be bound to pay Money to another at a time to come, this is no injury till the time do come, at which time the same is to be paid, being due, and is not paid, by the non-payment this now becomes to be an Injury; but here the award is, that the Defendant should pay Money, and the breach is laid in

in the non-payment of this according to the award, and so is within the submission, and the award; and according to the Book of 18 E.4. the Lord Lysles Case, although the award do exceed the submission, yet if a breach be laid in a thing submitted, as here it is, this is a good award for this, although void for the residue being not submitted; as here in this Case it may be a duty to come, and no injury until detained: As to the point of the date, he agreed herein the day of the date, this is the delivery more properly, here this goes to the delivery up of the award; otherwise it should be upon the Statute of Enrolments, there the same to be within six months after the date, there the same is to be so observed, but here it is good, and shall be taken to be from the time of the giving up of the award, and so the award here is good; and for the non-performance of this by the Defendant, according to his Assumpsit, the Plaintiff had good cause of Action, and nothing being material, is alleged in Arrest of Judgment, the Plaintiff ought to have his Judgment.

Whitlock Justice agreed herein in omnibus: As to the first matter, this is within the extent of the submission; they award debita, Trespasses, Injuries; debita includes all Trespasses, Injuries, Accounts and Demands; debita intends not only because it is a sum certain, but for this, that he hath cause to have this at a time to come, debita includes all: A Rent is debitum during the term, but solvendum not till the day, dies solutionis defertur, but it is debitum, for and during all the term: If a Man is bound to pay unto one, 100l. at Mich. next, this is debitum presently, but dies solutionis defertur; an Injury is defined to be Quicquid est contra jus, & jus est Norma recti, so that Quicquid est contra Normam recti est injuria: As to the matter of the date he agreed herein with the rest, and so Judgment ought to be given for the Plaintiff.

Dodderidge. This is here to be referred to the time, for which this takes life and force: The breach here is assigned in the non-payment of the Money according to the award, and this is within the submission, and so good.

The whole Court agreed herein for the Plaintiff, and therefore the Rule of the Court was, Quod judicium interetur pro querente.

Judgment for  
the Plaintiff,  
&c.

Nota, That Hicham the Kings Serjeant did move the Court in this, because these several Actions for slander were brought for Malice and Detraction, by one Plaintiff, against one and the same Defendant; he moved the Court, that he might be ordered to proceed in one of them, they being all three for the same words spoken.

The Court upon examination of the matter, and upon view of the Records and Declarations, by which it appeared, that they were all the three Actions for the same words spoken, as it was opened, but they were upon speaking of the words at several times, and therefore the Court denied his motion: For that as the whole Court agreed, every speaking of the words is a new scandal, and the Plaintiff may well for this have his Action, for every time that the words were spoken, because that by this so often speaking of the words, the scandal to him is the greater.

Afterwards the Serjeant moved to have these Actions laid in an indifferent County, (S) in Suffolk, where the words were spoken, if any words at all were spoken.

The Court did grant his motion for this, for changing of the County, upon oath made, that the words (if any were spoken) were spoken in the County of Suffolk, where he prayed the same to be laid; and upon oath to be made of this, by the rule of the Court, the Tryals were to be in the County of Suffolk.



Dickes and Uxor Plaintiffs, against Brown  
Defendant.

Prohibition.  
Noy 77.  
Eenl. 163, 170.  
Poph. 156.

**I**n a Prohibition the Case appeared to be this: (S) The Plaintiffs libelled in the Court Christian at Norwich, for a Legacy, the Defendant there pleading, shewed forth the Inventory which came to so much, and pleads fully administered; they there did examine this, and found that he had fully administered, and there a sentence given for him against the Plaintiffs, from which sentence they appeal, afterwards they desert and leave the Appeal, and came into this Court, and pray a Prohibition, and this was upon some suggestion made, and none present in Court to defend the same, upon a motion made, Termin. Pasch. 22 Jac. a Prohibition was granted. But nothing done in this during all this time, no return at all made of it; so that now by the Demise of the King, there being no Declaration in this Prohibition, and for this cause, the same was abated.

Calthorpe now moved the Court to have a Consultation, because there was no cause shewed for the granting of the former Prohibition, this being granted only upon a suggestion made, that they proceeded to try and determine whether he had fully administered, or not, of which they there had Consuance, for they have their Consuance of the principal (S) of the Legacy, they may also determine of this there whether he hath Assets, or not in his hands to pay this Legacy. But if they will there determine, or meddle with this, which belongs not unto them, they are then to be prohibited. So of Covin alledged there, to be in a matter which concerns the Legacy, or which is in discharge of this, they may there determine of this, as appears by 1 R. 3. fol. 4. In a Case of a Prohibition unto the Court Christian; because they there proceeded to try matter of Covin, Pasch. 14 Jac. B. R. between Wallis Plaintiff, against Leyde Defendant. In a Suit for a Legacy in the Spiritual Court, they were at Issue there, upon a point of Covin, as touching matter there alledged in discharge of a Legacy; upon this a Prohibition was prayed, and denied, and a Consultation there granted, because they had Consuance of the principal, and for this cause, they have cause also there to determine of the accessez, being Covin, concerning the Legacy; it was there adjudged for the Consultation, and the Prohibition was denied. And so he moved here,

1 R. 3. f. 4.  
Pasch. 14 Jac.  
B. R. &c.  
Moor 917. n.  
1307.

1. Because no Declaration, nor any return made, and nothing done in the Prohibition, by reason of which, this is abated, as it was here adjudged between Trumpley and Maio, Termin. Pasch. 1 Car. B. R. upon which Judgment it was moved, 1. To have the said Prohibition abated; and 2. It was moved because the sole suggestion for the first Prohibition was, because they there held Plea to determine of fully administered; the which was no cause to grant a Prohibition, they having power and Consuance to hold Plea, and to determine of the principal (S) the Legacy, and therefore they shall also have power to determine the Plea of fully administered, which goeth in discharge of the Legacy; and upon all this a Consultation was prayed unto the Court Christian of Norwich, the Prohibition being abated by the demise of the King, and not aided by, nor yet within the Statute of

Termin. Pasch.  
1 Car. B. R. &c.

Stat. of 1 E. 6. 1 E. 6.

The Court upon this gave a day to the other side to shew cause why in this Case a Consultation should not be granted. At which day, the Court was moved to have the former Prohibition granted, to be renewed, the same being before granted by the Rule of the Court, and now determined and abated per demise le Roy, (as it hath been confessed and admitted) a new Prohibition was therefore prayed upon the same reason and suggestion, upon which the Court granted the former.

All

All the reason offered to the Court, for to have a new Prohibition in this Court, was only this, because the same was formerly moved in Court, and the Court upon the motion made, had granted the former Prohibition, the which they would not have so done, if they had not then seen good cause for the granting of it; but the cause now appeared not. The suggestion it self, against the Prohibition, being only this, for that they there held Plea, and proceeded to determine, pleinment administer, which as it was urged, they may well do, having power to determine the principal, (S) the Suit for the Legacy. But the true cause for which the first Prohibition was granted, (as was conceived) was this, upon the suggestion misopened to the Court, and a Prohibition prayed, and then according to the usual course, a day was given to the other side, to shew cause why a Prohibition should not be granted, and no notice being given of this motion and rule, for default in shewing of cause, the Prohibition issued of course; but nothing done upon it. It was therefore now moved again for a Consultation, upon the former reasons and authorities.

Dodderidge Justice. He hath deserted his appeal, and moves for a Prohibition; this is but matter of delay, he hath also delayed this matter in the Prohibition, so that by this course, the party shall be enforced to expend more than the value of his Legacy, before recovery of it; they were at Issue there in the Court Christian, touching fully administered, they may there well try and determine this, this is there triable before them, per testes, they have there Conulance of the Legacy, and therefore of this Plea also. But if they do there refuse to allow of this in proof, which the Law doth allow of, as to the discharge of the party, in point of Assets, this shall then be a good cause to have a Prohibition, upon a true suggestion made of this. But here the suggestion is altogether insufficient, and so no cause for a Prohibition.

Curia. We do here try fully administered, or not, by a Jury; they there try this, per testes, and they have Conulance of this. But if they in their Proceedings refuse such a proof, for fully administered, in discharge of the party which is allowable at the Common Law, a Prohibition then is to be granted; but here nothing is in this suggestion, but that they there went to Issue, only upon fully administered, or not, the which of it self, is no cause to have a Prohibition. For if they do not in such a Case proceed there, infinite delay shall be, for they will then after sentence there against them, Appeal, and then will desert their Appeal, and come and move here for a Prohibition, as here it was done in this case, and this only for delay, for the preventing of which, for this time and for the future, the Court gave further time for the Plaintiff in the Prohibition, to see and to inform himself better with the suggestion for a Prohibition, which at this time he hath not so done, and to shew better cause, or a Consultation shall be granted.

But by the whole Court, they are there to proceed, in the interim, in Court Prohibition Christian, without being prohibited by this Court, and so no Prohibition granted, denied, but to proceed there.

*Beverley Plaintiff, ——— and against twenty others  
Defendants.*

**I**n a Will before the Council at York, wherein the Case was: *The Plaintiff Prohibition.* preferred his Will against the Defendants, before the Council at York, and in this he shewed that whereas Beverley his Father, by his Deed had granted unto him a yearly Rent-charge of 12 l. per annum, and that he had delivered this Deed unto Beverley the Defendant to keep for his use, who refused to deliver this unto him, saying that he had lost it, so that by this he is deprived of all his remedy at the Common Law.

This Rent being granted unto him for life, being the younger Son, and by him delivered to the Defendant, being his elder Brother to keep for him, and his use, and by the conclusion of the Will, he prays Process to have the Defendants appear, and to answer upon their Oaths, touching the said Deed, and to have delivery of this made to him, and also to have him ordered to pay the said annual Rent unto him according to the contents of the Deed.

Upon this, Davies the Kings Serjeant moved the Court for a Prohibition to stay proceedings before the Council at York, this Rent being matter of freehold, with the determining of which, they are not there to meddle.

Curia. They are not there to determine this matter, nor yet to order any thing there as touching the Rent, this being matter of freehold; therefore by the Rule of the Court, a Prohibition was granted, to prohibit them from proceeding there, quoad the Rent they are not there to meddle with any determination of this, but not to be prohibited, quoad the Deed; for they may there well proceed to examine any matter, touching this, and to order the delivery of this there to the Plaintiff, if they find cause for it. And so by the Rule of the Court, a Prohibition was granted only, quoad the Rent, but they to proceed there with the residue of the matters in the Will contained.

A Prohibition granted quoad the Will contained.

Nota.  
Touching *Ly*  
*Gager*.  
Benl. 151.

Nota. One had day given him to wage his Law, at the day he came not to wage his Law, but made default. The Court was moved for another day to be given him to come and wage his Law, in regard he could not come at the first day to him preferred to wage his Law.

Crew Chief Justice. This day given him to come and wage his Law, is not so preemprory unto him, but that this doth rest in the discretion of the Court, to give unto him another day to come and wage his Law, upon good cause shewed in excuse for his not coming the first day to perform this; for it may be so, that he may fall sick by the way, or be otherwise hindered, that he could not by any possible means come the first day, and if it be so, the act of God, no default being in him, shall not put him to any prejudice; but another day may well be given him, to do this.

The rest of the Judges in this were all against him, for that this day given him to wage his Law, is peremprory unto him, without any further day to be given unto him to wage his Law; and therefore by the Rule of the Court, an entry was made upon the Record, quod defecit de lege, and so by this he was ousted from waging of his Law in this Case afterwards.

### *Smale Plaintiff, against Mary Warne Defendant.*

Debr.

**I**n an Action of Debt for 80l. brought against the Defendant, as Executrix of one Southerne an Attorney of the B. R. common Bail offered to be put in, because in Case of an Executor, and this without acquainting the Plaintiff with it, but the same was not as yet received.

Calthorpe moved the Court for the Plaintiff to have special Bail put in, grounding his motion upon a pretended privilege, that Attorneys and Clerks of the B. R. claim to have where they are Plaintiffs in Actions, (S) to have special Bail given to them, although the Suit be against an Executor, in which Case by the Law, common Bail is to be taken, and not to be enforced to find for sureties special Bail, and shewed that the Plaintiff is an Attorney, and a Clerk del B. R. and therefore claims this privilege for him, to have the Defendant put in special Bail.

The



The reason why a Defendant being an Executor, shall give but Common Bail, is, because he being charged as Executor, his Body shall not be taken, unless it be in a Case of a Devastavit proved against him, and upon special Bail taken, the Recognizance is, ita quod, that he render his Body, which shall not be so against an Executor, but in case of a Devastavit only; otherwise no Capias lyeth for the Body of an Executor. And if an ordinary Person had been Plaintiff against an Executor, then without any question by the Law he is to give but common Bail; and how here in case of a supposed privilege (as it was urged) for an Attorney of this Court, being Plaintiff against an Executor, the Law shall be altered, this was the great doubt and question.

The whole Court did much doubt of this, and therefore commanded the Plaintiff to search for Presidents in such Cases, that so the Court may be informed, that the use and course hath been so, and if Presidents can be found and shewed to the Court, to satisfy the Court, this to be so, then the same Rule shall be made for to have special Bail; otherwise, without direct Presidents shewed in point, to warrant this, no such Rule to be made.

Nota, This Case, quod mirum, if it should be so, that matter of Privilege for an Attorney should alter the Law. But no such Presidents were produced.

### Termin. Hillar. 1 Car. Regis Banco Regis.

Boyer Plaintiff, against Rivet Defendant.

Entred Termin. Trin. 1 Caroli Regis B. R.

Rot. 1146.

**I**n a Scire facias against the Defendant as Heir, upon a Judgment given in an Action of Debt against his Father, to have Execution against him, who pleads riens per descent, issue joyned upon this, and found against him for the Plaintiff, that he had two Acres of Land from his Father by descent. The question moved and insisted upon, was, whether a general or a special Judgment shall be given against him.

It was urged for the Plaintiff, that a general Judgment shall be given against him, for this his false Plea, and he shall be charged as Tenant. In Davies and Pepys Case, second Part of the Commentaries, fol. 44. If an Action of Debt be brought against the Heir, he ought to come in and confess what Land he hath by descent, and this shall be put in execution; the writ demands no more, but the Land which he hath per descensum hereditarium. It was urged that the Scire facias is here brought against him, as Heir and Tenant, and for this his false Plea, the like Judgment shall be given against him as is Coke 3 pars. f. 11. in Sir Will. Herberts Case, some things are odious in the Law (as it was urged) and for which a Man shall be punished in his Land, Body and Goods.

As 1. For a lie, as if one do sue another without any cause, pro falso clamore, he shall be amerced, and his Goods subject to it.

2. For a Lie in pleading, a Man shall be punished, and charged by his Body, Lands and Goods, as if one do sue another, as Executor, and he pleads, Ne unques executor,

A Scire facias  
against the  
Heir.  
Poph. 153.  
Benl. 162.  
Jones 87.

Commentaries  
2 part f. 440.  
&c.

Coke 3 pars,  
fol. 11.

11 E. 3. Fitz.  
tit. Debt,  
placito 7.

Commentaries  
Davies & Pepys  
Case.

executor, if this be found against him, he shall be chargeable with the demand, the reason why the Heir shall here be charged, is because he is bound with his Father in the Bond, this is the instrumental cause to charge him, 11 E. 3. Fitz. tit. Debt, placito 7. An Action of Debt brought against one as Heir, who saith that he is Heir with others in Gavel-kind, and so to be all charged equally; the Heir is chargeable in respect of the Land which is the material cause, for which the Heir shall be charged with the Debt of the Father, being bound with him in the Bond, and having Land from him by descent, and for the Heir to be charged in such a case, appears by Sir William Herberts Case, Coke 3 pars. Here the Heir is to be charged, and a general Judgment to be given against him for his false Plea: Commentaries in Davies and Pepys Case. A Judgment given against the Heir upon a Nihil dicit, there nothing but the Land which he hath by descent, shall be put in execution; but here a general Judgment is to be given against him for this false Plea (as it was urged) which appears by an inference out of 33 E. 3. Fitz. tit. Execution placito 162. a Scire facias there against a purchaser, upon his Traverse there found against him; a general Judgment could not there be had against him, because he was a purchaser; but otherwise it should have been, if it had been against an Heir.

It was urged for the Defendant, that a special Judgment, and not a general ought here in this Case to be given against the Heir. The recovery here was against the Father upon a Bond of 200 l. a Scire facias by the Executor of him, who recovered against the Heir of him, against whom the recovery was had, who pleads riens per descent, found against him, that he had two Acres, a special Judgment is here to be given.

10 Eliz. Dyer,  
f. 171.

27 H. 6. Fitz.  
&c.

All the Cases before remembred, may be agreed for good Law, at the Common Law before the Statute of Westminster. 2. Land was not liable, if an Action of Debt brought against the Heir, who pleads a false Plea of riens per descent, it is now to be examined how he shall be charged, whether as a purchaser, or as Heir; he is here to be charged as a Purchaser, as Ter-Tenant, 10 Eliz. Dyer, f. 271. A Judgment is given against the Ancestor, Debt lieth not against the Heir upon this; therefore (as it is urged) he is to be charged as Ter-Tenant, and not as Heir, here he is to be charged as a purchaser. As to Sir Will<sup>m</sup> Herberts Case, this was ended by composition. It appears by 27 H. 6. Fitz. tit. Execution placito 135. In a Scire facias against the Heir, Execution there was only of the Land, of which the Father was seised.

1 H. 7. f. 2. &c.

Reasons why the Judgment here should be special, and not general. 1. Because the Heir is here charged as a Purchaser. 2. Because nothing appears here to bind him, as by 1 H. 7. fol. 2. 2 R. 3. fol. 21. 13 E. 4. fol. 4. appeareth, In all this original Record it doth not appear, that the Heir was bound with his Father. 3. Because the Judgment given against the Father, hath determined the specialty by which the Heir was bound; so that he doth not shew this upon the Scire facias, in which he is to be charged as Ter-Tenant. 4. It appears by the Record, that the Defendant is here charged as a purchaser, for he is charged by the Scire facias, as Heir apparent, and by this it is to be intended, that his Father is living, and so he is charged as a Purchaser, and not as Heir, and therefore a special Judgment is to be given against him, and not a general Judgment to make his Land only liable, which he hath by descent, and not the Land of his own purchase.

1. Whitlock Justice. That the Judgment here ought to be special (S) of the moiety of the Land, which he hath by descent from his Father, and not a general Judgment. Admit, that if an Action of Debt be brought against the Heir; that a general Judgment should be given against him for his false Plea, yet this is no proof that a general Judgment shall be given against him, as this case here is; For upon this Judgment against the Father, the Law by this hath presently ascertained, defined, and set down, what Land shall be subject unto this Execution, for by the

the Judgment, transie in rem Judicatum. If after this, that the Law hath made this certain, whether the Plea of the Heir may alter the Law, and make this to be of larger extent. As to this, the same shall not extend the power of the Judgment; but this ought to be of the moiety of the Land, which he had at the time of the Judgment. To examine the reason of the difference of the Action of Debt against the Heir, upon the contract of his Father, and of the Scire facias, against him, to have Execution upon a Judgment given in Debt against his Father, where the Action of Debt is brought against the Heir, being bound in a Bond with his Father, there by his Plea, he makes this to be *litum suum*, his proper Suit; and by his *faux Plea* he endeavours to deceive him, 6 & 7 E. 6. Dyer, 6 Eliz. Dyer 10. 17 & 22 Eliz. Dyer, these Cases come near unto this Case in question, but they are not full in point; but reasons drawn out of these Cases, will well serve to maintain this my opinion.

6 & 7 E. 6. Dyer  
6 Eliz. &c.

An Action of Debt brought against the Heir, this stands upon two Reasons, 1. Upon the Contract of the Father, because the Heir is bound with the Father in the Bond. 2. In respect of the Possession which he hath, and without both these the Heir shall not be charged. In Debt against the Heir, it shall be in the debt & detinet, against an Executor in the detinet, but it shall not attach upon the Heir, if he be not bound by the contract of his Ancestor, and also hath possession. The Heir may avoid this, if he alien away the Land, before any Action brought against him, he shall be by this discharged.

In a Scire facias against the Heir; this doth charge him as *Ten-Tenant* only, in the nature of a Purchaser. For the Ancestor either conveyed this Land unto others, or suffered this to descend. Also the Plaintiff here is not more prejudiced by the *faux Plea* of the Heir, than he is by the *faux Plea* of a Purchaser, being the *Ten-Tenant*, they are both of them in one and the same degree. The Purchaser, and the Heir, they both of them being charged as *Ten-Tenants*. By the former Judgment the duty is settled and recovered, and by this, transie in rem Judicatum, all the Cases before remembered by the Counsel on the other side, may be admitted, and do make nothing at all, against this which I do now hold, for there is a very great difference between a Scire facias, against the Heir upon a Judgment given against his Father, this being no demand of any duty, but to have him to come in, and to show cause, wherefore he should not have execution against him, upon the same Judgment had against the Father. But he cannot have an Action of Debt against him, upon the same Judgment, no binding being now against him, for he is not here charged as Heir, but as *Ten-Tenant*; No *Chaine* nor *Procreation* lieth in a Scire facias, because nothing is by this demanded. It is not material in this Scire facias, whether the Heir was bound with his Father in this Obligation, or not, whereupon Judgment was given. And so upon this difference, between an Action of Debt, and a Scire facias against the Heir, and his *faux* ensuing Plea, not a general, but a special Judgment, as this Case is, and upon the Cases and Reasons before remembered, is to be given against the Defendant, (S) to have Execution of the moiety of the said two Acres, descended to him as Heir, and not a general Judgment.

Jones Justice. The question here in this Case is, what Execution shall be had against the Defendant. The Judgment here shall be against the Heir, as it shall be against a Purchaser, (S) for the moiety of the Land; these things here are only considerable, two of them as inducements, and the third the main matter, 1. How the Heir shall here be charged together with the reason of it. 2. How the Heir in this Case is to demean himself in pleading, and what shall here ensue upon this his *faux Plea*; And 3. Being the main matter of all, how the Judgment shall be, upon this his *faux Plea* found against him in this Scire facias.



1. As to the first, there are two things to bind the Heir, (S) 1. His being bound with his Father in the Obligation, and the Land which he hath in his possession for to charge him, the party may pray to have a Judgment general upon his Plea, that he hath riens per descens. If one doth bind him and his Heir in a Warranty, Covenant, Debt, Annuity, the Heir shall be subject for the Land, all the Heirs to be equally charged, and if one Heir be sued severally by himself, he shall have contribution against the others, as appears in Sir William Herberts Case before remembred.

2. To see how far the Heir shall be charged for this his faux Plea, for this see Commentaries, fol. 440. in Pepys Case, where it appears how he ought to behave himself in pleading, (S) to confess the verity of this Land, which he hath by descent, but if he doth not confess it, as if Judgment do pass against him upon a Nilhil dicit, non sum informatus, or confession, No general, but a special Judgment shall be given. But upon his faux Plea of riens per descens, a general Judgment shall be given; In 18 Eliz. Dyer, fol. 344. Hemminghams Case, that a special Judgment shall be given in all Cases, but where he pleads a faux Plea. In the Case of warranty, upon a voucher he pleads riens per descens, and found against him, the recovery in value shall be only of the Land which descends, otherwise it is in an Action of Debt against the Heir, who pleads a faux Plea, there the Judgment shall be to have execution of the moiety of all his Land.

3. As to the third matter, This Case is not in Debt against the Heir, but in a Scire facias against the Heir, upon a Judgment given against his Father, and here he is to be charged merely as a Purchasor, as Ter-Tenant. To consider this, 1. At the Common Law: At the Common Law no remedy there was against the Heir; West. 2. c. 20. there are two branches of the Statute of Westminster. 2. cap. 20. one for the Elegit, the second the Scire facias. At the Common Law, Debt against the party; No Scire facias against the Heir, where the Judgment was against the Father, these Lands which the Heir had at the time of the Action brought, are liable and those Lands which the Father had at the time of the Judgment, are liable to the Execution, and if he doth enfeof his Son of these Lands, yet they are liable; as to the Statute, this gives the moiety of all the Lands. As to the present Case now in question, will you by this Plea extend the Execution further than the Statute hath prescribed the same to be, which is for the moiety of his Land: this cannot be, and this is the chief reason grounded upon the Statute: Also the Scire facias demands nothing, this being for him to shew cause why he should not have Execution of the Land, which he hath by descent, and here by reason of this his Plea, you would now enlarge this to Land, which he hath of his own purchase, which can not be done; the Heir here in the Scire facias is not charged as Heir, as appears by 5 E. 3. Fitz. title Age, placito 95. 6 E. 3. fol. 135. and Sir William Herberts Case, that the Heir is charged as Ter-Tenant, and not as Heir, the question here only is, whether by this faux Plea, a purchasor or an Heir shall be so charged, so that by reason of this faux Plea, the Judgment shall be enlarged, It shall not so be. As if after the Judgment, he doth alien away the Land, and a Scire facias is brought against the Purchasor, it hath been adjudged, that by this his faux Plea, he shall not be charged, but for the moiety of the Land purchased, and here the Heir is chargeable in the nature of a Purchasor; and therefore the same reason well holds for him; and so upon the whole matter, the Judgment here to be given against the Defendant, ought to be special and not general, (S) to have execution of the moiety of the Land, to him descended.

3. Dodderidge Justice. It is to be considered here in this Case, how the Defendant being the Heir, is to be charged with this duty. As to this, All our Books do agree in this, that he is to be charged as Ter-Tenant; For the true deciding of this matter, these particulars are to be considered. (S.)

1. The Action of Debt against the Heir, and upon what ground this is.
2. In Case of a Recognisance against the Heir, how he shall be charged.

3. In

5 E. 3. Fitz. tit.  
Age, placit. 95.  
6 E. 135. &c.

18 Eliz. Dyer,  
344. Hemming-  
hams Case.

West. 2. c. 20.

3. In Case of a Scire facias against the Heir, how he is to be charged.

4. How the Heir shall be charged upon a Warrant. In a Warrantia Chartæ, here the Heir is not to be further charged, but for the Land which descends unto him.

1. In an Action of Debt against the Heir, there he chargeth him as Debtor, not as terre Tenant, for he is bound in the Bond, and from 18 E. 2. until 7 H. 4. the Law did run for current, that the Heir was not chargeable in Debt, if the Executor had Assets; the reason of the Law was, which was altered in 7 H. 4. they did then conceive the Heir should be charged, although the Executor had Assets, if the party would sue him; the reason of the Law was, because this was his own Debt, and he is charged as Debtor, which is his own Debt; observe the Writ which is against him in the debt & detinet, but against the Executor, who represents the person of the Testator, it is only in the detinet, the Heir he is Debtor by reason of his own Contract.

The President cited in the Commentaries, in Pepys Case, that an Action of Debt lieth against the Executor of the Heir, which cannot be, if he doth not charge the Heir, as with his proper Debt; then observe the manner how the Heir defends himself in pleading, that he hath no Assets descendable, pour del brief purchase: If he had aliened the same after, his own Land shall be liable by his faux Plea; he being bound in the Obligation, this makes him a Debtor, but if he be not bound, then to be charged as a Purchaser and terre Tenant; the Heir may sell his Land which to him descends, if this be aliened away before the Writ brought against him, he is not then chargeable.

2. In case of a Recognizance there are no words to charge the Heir, being only vult & concedit, quod executio fiat, de terris & tenementis; he is not there charged as a Debtor, but as a terre Tenant, as appears by 33 E. 3. 27 H. 6. 33 E. 3. and Sir William Herberts Case; That the Heir in case of a Recognizance acknowledged, comes in as terre Tenant, but yet not merely as terre Tenant, but rather because he comes in as party in Blood; and as to the Judgment, the terre Tenant may say that the Heir hath Land by descent; the Heir comes in as party to the first Judgment, and if he hath Land by descent, he is to be charged before the terre Tenants, and the Heir shall not have Contribution, but against the other Heirs; the Heir is party to the Judgment, but the Land only which descends is subject unto this.

3. As to the Scire facias, this is to be brought against the Heir, to shew cause why execution should not be had against him upon the Judgment, and this comes to the Case here now in question: In which it is considerable how the Heir comes in, he comes in, in the same manner, as in the Case of a Statute upon the Recognizance, 33 E. 3. Fitz. tit. Execution, placito 162. is an express Case in the point: In case of a Judgment, the Heir pleads a faux Plea, and there adjudged, that the Judgment shall be given against him only for the Land which he hath by descent.

4. In the Case of Warrant, this runs in another manner: If he vouches one as Heir within age, he shall not charge him further: If he enter into the Warrant with a Protestation, that he hath riens per descent, if this be found against him that he hath Land by descent, he shall have a recovery of this only in value, and of no other, and so throughout, this is a plain and a clear Case, That no Judgment shall here be given against the Defendant, but for a moiety of this Land which he hath by descent.

5. Crew Chief Justice agreed herein, that the Plaintiff is to have Judgment and to have Execution only of the moiety of the Land, which the Defendant hath by descent from his Father; and so is Sir William Herberts Case in effect, which is in the nature of a Reading upon this Learning: A Man binds him and his Heirs,

the Heir is bound in privacy, as Heir; here the Judgment was given against the Father, in an Action of Debt upon an Obligation, in which the Son was bound with him.

It is now to be considered what Land is liable by this Judgment, clearly the Land of the Father, which he had tempore judicii, and not the Land of the Son, for all other Land is quit, as to be charged with this Judgment; the Plaintiff is to have for his Execution the moiety of this Land which descends; the Statute doth not give more, but only of the moiety: Execution to be in Debt against the Son, here he is bound in privacy, because the Father hath bound him, the Body is liable, per capias, the Debt is transferred by the Judgment, no Debt afterwards against the Father; upon the Scire facias here the Son comes in merely as terre Tenant, and in no other manner.

Commentaries, in Pepys Case before remembred, there the Judgment given upon his faux Plea; clearly no Land is here liable to this Judgment, but the Land which descends unto him from his Father.

In Case of the Recognizance the Son is not bound, the words being, (S) Concedit quod currat super, &c. and the Son is not bound: This faux Plea here shall make no alteration, the Land of the Father, and which he hath by descent, shall be only liable to the Execution upon the said Judgment, as appears by 5 R.2. Fitz. tit. Annuity, 40 E. 3. Fitz. Warranty, & 33 E. 3. Fitz. tit. Execution, placito 162. before remembred: The difference will be between a personal and a real charge; this charge here is real, and the same shall not be prejudiced by this his faux Plea.

And so in this principal Case, no general, but a special Judgment is to be given, (S) To have Execution of the moiety of the Land, which descended to the Defendant from his Father.

And so the Court all agreeing in this, according to this their resolution, they caused a Rule to be entred, that the Plaintiff have a special Judgment, (S) to have execution only of the moiety of the said two Acres, which the Jury have found to descend unto the Defendant the Son, by descent from his Father, and no more; and no general Judgment in this Case to be, by reason of his faux Plea of riens per discent by him pleaded, and found against him, thereby to make the Land of his own purchase, to be subject to the execution upon the said Judgment.

Costs denied, Nota, That in this Case, it was moved for the Plaintiff to have his full Costs: *per Curiam.* But to grant this, the Court denyed, because that no Costs are due by the Law in the Scire facias.

### *Dominus Rex, against Bell.*

**Indictment.** UPON an Indictment for Perjury, assigned in an Affidavit made before Sir Robert Rich, Exception moved for the quashing of it.

1. It is not laid that Sir Robert Rich was a Justice of the Chancery.

2. That this is no Perjury within the Statute of 5 Eliz. cap. 9.

3. Because he concludes this to be contra formam statuti of 5 Eliz. for Perjury, in this Affidavit, which is not within the Statute.

**Indictment quashed.**

Curia allowed of these Exceptions, and for these Exceptions, by the Rule of the Court, the Indictment was quashed, and the party of this discharged.

*Hungerford*



*Hungerford Plaintiff, against Haviland Defendant.*

Entred Termin. Hillar. 22 Jac. B. R.

Rot. 194.

**I**N an Action upon the Case for a Promise; the Case upon the pleading was this; Thomas Smith was seised of Land, and held this of the Plaintiff, as of his Mannor of Winston, by Kent, and by a Customary relief of one years value: Smith aliened this Land unto Haviland, who 1 Maij, 10 Jac. devised this to the Defendant Haviland, the Devisor died, the Defendant entred and was seised: The Plaintiff lays a Colloquium between him and the Defendant, as touching the arrearages of the Kent, and the relief, the Plaintiff said unto the Defendant, that if he would not pay him, he would put him in suit for it; upon this the Defendant did assume and promise unto the Plaintiff, that if he would forbear the putting of him in suit until the next Court, and then if the Plaintiff should make it appear to the Brothers of the Defendant that these Tenements were so chargeable, with the 5 s. yearly Kent, and with the relief, that then he would pay this unto him; the Plaintiff avers, that upon this he did forbear the suit, and that at the next Court he made it to appear to the Brothers of the Defendant, per presentationem homagij Curie illius, and also by the Records of the Court, that the Kent and Relief were due unto him by the Defendant, and that notwithstanding all this, the Defendant hath not paid this unto him according to his promise: unde actio, The Defendant comes in and confesseth the Action.

Promise.  
1 Ro. Rep. 370.  
Litch. 37. 94.  
129.  
Benl. 180.  
Jones 132.

As to the Exceptions taken in Arrest of Judgment.

The first and chief Exception insisted upon, was, That he cannot have remedy for the Relief, if the Law do not give him remedy for it; and so this resembled unto Godfreys Case, Coke 11 pars, as to prescribe in the thing, so he ought to prescribe in the means to come unto it.

Coke 11 pars,  
&c.

As to this, it is here laid, that by Law he may distrain for it, this being Relevium cum acciderit, secundum consuetudinem Manerij, so that (as it was urged) this is parcel of the Tenure, and then he may well for this distrain; and this appears 14 H. 4. fol. 2. full in point, in the Case of Recordare longum, by Hankford; but admitting he had no remedy for this Relief, yet he may distrain for the Kent, and this is sufficient to ground the promise for the whole, and this is a good consideration.

A second Exception insisted upon, that this is laid too generally.

As to this, it is sufficiently laid that he had made this to appear to his Brothers, and it is certainly laid, for it is in this manner, That he made it to appear by Presentment of the Homage of the Court, upon Oath, and so by them presented; and by the Rolls of the Mannor, and here the promise is the point and ground of the Action.

It was further urged in Arrest of Judgment, that the relief here is merely due by Custom, and so no remedy for this but by Custom.

It was urged, that two things are here to be done before payment.

1. To surcease the Suit.

2. To make this appear to the Defendants Brothers that the same was due: He

It 2

makes

makes it appear that it was due by Smith long time before, and by Haviland, but not due by the Defendant, and then no cause of Action.

1. Whidlock Justice. Two Exceptions only insisted upon: The point is, Whether this relief, as it is laid in the Record, be of such a nature, as that remedy may be had for it.

It is here laid, that the Land is held per redditum, & per relevium cum acciderit, which is part of the Tenure, and for his remedy, he may very well distrain for this.

When this Case came first in question, I put the Case of 14 H.4. of relief for a Knights Fee leviable by distress, because due by Tenure.

The Statute of Magna Charta doth not introducere novam legem, it doth but explanare veterem, cum acciderit, by this the same is well explained, when this ought to be paid; here it is due by Tenure, and here is a sufficient consideration to raise an Assumpsit, because he may have remedy by distress; but admit that he hath remedy for the Rent, and none for the Relief, yet the consideration is good, and it is not to be construed and examined by weight and measure.

If the consideration depends upon two parts, and remedy is for the one, but not for the other; if one part of the consideration stands, this is a good ground to make the promise good.

2. As touching the means how he hath made this to appear that the same was due; the Record as to this, is, that he was to make this to appear that the Land, est onerabilis.

As to this, there is no better means and evidence to make this to appear, but by these two ways, (S) by the presentment of the Homage upon Oath, no better nor stronger evidence can be: For that all the Rights of the Lord are examinable and triable by the Homage, this is evident, and a direct means for the Rent.

As for the Relief, he saith that he hath made this to appear, per Rotulos Curie, this being the proper evidence to prove this: For if the same be due by Custom, or by Tenure, the same ought to be made appear by the Rolls of the Court.

If speech be made of proof generally, this ought to be proof by Jury; If of matter of Record, this is to be proved by the Record; but if proof be to be made of a particular benefit which the Lord of the Manor is to have, then no better proof can be made of this, than by the Rolls of the Court, for no proof can be more directly and particularly, than by setting down of all the Rolls in certain: If the proof had not been good in Law, the Defendant ought then to have demurred in Law to it; but here the Defendant hath not so done, but he hath confessed the same, so that this is now admitted by him.

And so the Judgment here ought to remain in force, and the Plaintiff ought to have his Writ of enquiry of Damages.

2. Jones Justice. As to the first Exception, that here is no remedy for this Relief.

As to this, the point grows by reason of the Tenure, or by reason of the Custom; if by Tenure, he may then distrain; if by Custom, then to be considered what remedy for this, as to have the Custom to maintain the relief, so also to have the Custom to maintain his remedy for this Heriot Custom, not to distrain but by Custom.

If Relief be due by Custom he hath no remedy for this but by Custom; here there is a Tenure laid besides the Custom, it is laid, that he held of him per relevium, to be paid secundum consuetudinem Manerij, but that it is due by Tenure, and then he hath good remedy for this, and so here he hath good remedy for this, and that the consideration is good in substance.

As to the last point, that he was to make this to appear, this as it is here laid,

Gray. Ch. c. 2.

laid, is good in substance, and the Defendant hath made all good by his Confession.

3. Dodderidge Justice. By the Book in temps, E. 1. tit. Relief, and 40 E. 3. it is agreed, that Relief is no part of Service, and therefore till our later time agreed that Debt lyeth for it, this may be incident to the Tenure, but yet no part of the Tenure.

The Statute of Magna Charta, is in part Introductivum novi juris, for the Barons relief before this Statute was at the Kings pleasure, as appears by Glanville tit. Relief; but the Statute of Magna Charta hath now made this certain. Stat. of Magna Charta. 29. 2. 12. 13. 14.

If by this Declaration it appears, that the Relief is due by Custom, then no remedy can there be for this but by Custom: No other case may be resembled to this, but the case of the Heriot, for Heriot Service he may seise or distrain, but for Heriot Custom, seise, as it is resolved in Plowdens Commentaries, in Woodlands Case, second point: If due by Custom, there is then a failure of part of the consideration; for then the point will be, whether the other part of the consideration will uphold the promise, or not; that the same will not, but all the considerations alleged, ought to be performed, or no Action upon the Case lieth upon the Assumpsit, 16 Eliz. Dyer, A consideration to raise an Assumpsit, ought to be a mutual recompence. pl. 97.

6 H. 7. fol. 11. A notable Case in Trespals adjudged upon a Concord there pleaded, that the Defendant should do two things, it is no Concord unless that both the things are done, he ought to perform all.

As to the other matter, whether he shall take advantage of this Declaration after his own confession; as to this, he may take advantage of the Declaration, for although he hath confessed this matter, yet he may well shew unto us, that we, as Judges, should give an erroneous Judgment; this he may shew unto us by way of prevention, & ut amicus Curie, in Arrest of Judgment.

As to the Exception taken for the making of this to appear that the Rent was due, how this ought to be done, by the presentment of the homage, and the relief, by the Rolls of the Court, and so it is expressed in the Declaration to be: As to this manner of appearance, in his imagination he thought he could make it appear, but this is no full proof, but he ought to shew that the same was paid, for the Steward may put in what he will, but he ought to make it appear that the same was paid, and then we are to judge upon it: And so without any absolute or final opinion in this Case given, he desired time to be further advised herein.

4. Crew Chief Justice. Two Reliefs here laid to be due by reason of two several alienations; as to the Case 14 H. 4. the Case de recordare longum, if Relief grows due by Custom, there it is clear that he ought also to have a Custom to enable him to have means to recover this; generally Reliefs are to be paid upon the death of Tenants, here he claims to have this upon every alienation; here this is due by Custom, not by Tenure; here two things are to be made to appear, and this two ways, one way for the Rent by the homage, and for the Relief that is due by the Rolls; if he hath made here the Rent and the Relief sufficiently to appear to be due, is the question; if the promise be in such a manner, that if he shall make it to appear that the Rent and Relief were due, he ought in pursuit of this to make this appear by Action, and by proof in this.

As to the confession here, he shall not be admitted to say after this, that the same is not due; as touching this, vide 7 R. 2. Fitz. tit. Bar, placito 241. What manner of proof ought to be where before the Suit, and where in the Action: Also he ought to make both to appear, that the Rent and also the Relief was due, and if he only makes part to appear, he is not to have his Action; as if a Man doth promise to another so much, if he delivers unto him so many Quarters of Corn, if he delivers libers



livers but part, he shall not have his Action upon the Case for the promise, before he hath delivered all.

And so without any further debate at this time, this principal Case rested upon a Curia advisare vult, and so the same was adjourned to a further time.

Trin. 2 Car.  
B.R. &c.

Afterwards, (S) Termin. Trin. 2 Caroli Regis B. R. this Case was moved again, and argued at the Bar, and after by all the four Judges, who agreed all in opinion for the Plaintiff, and accordingly by the Rule of the Court Judgment was then given, and so entered for the Plaintiff.

*Turnor* Plaintiff, against *Denning* Defendant.

Entred Termin. Trin. 1 Caroli Regis B. R.

Rot. 107.

Trespas.

**I**n an Action of Trespas, for Trespas done with his Cattel in two Closes of the Plaintiffs, the one called the Court-Close, the other called the Moor-Close, and lays the Trespas with a continuance.

The Defendant in Bar, shews that the Court-Close is next adjoining to the Moor-Close, and that the Moor-Close is next adjoining unto a Meadow-Close, and that he, and all the Occupiers of the said Meadow-Close, have used fugare & refugare averia sua, from the Meadow-Close to the Moor-Close, and from thence to the Court-Close, and lays an Estate in himself, at will, in the Meadow-Close; and that he according to the usage at the same time, did chase and re-chase his Cattle.

Upon this Plea in Bar, the Plaintiff demurred in Law, because the Custom by him alledged, is only a Custom to do wrong to another, which the Law adjudges to be a bad Custom.

Judgment for  
the Plaintiff,  
&c.

Coke 4 pars, in Gatewards Case, Tenant at Will may prescribe in case of profit, but not in case of easement.

The whole Court clear of opinion, that the Bar here was not good, and that the Plaintiff had good cause to demur unto it, because the Custom by the Defendant alledged, is only to do a wrong, and so not good, and so for this cause the Bar is insufficient, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

*Alfrey* Plaintiff, against *Blackamore* Defendant.

An Action up-  
on the Case for  
a promise.  
Lach. 97.  
Bent. 159.

**I**n an Action upon the Case for a Promise, for payment of a Marriage Portion, upon Non assumptis pleaded, a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that the Declaration was not good, because that no notice is therein expressed to be given by the Plaintiff to the Defendant, of the day of the Marriage, before which time the Defendant was not bound to pay this, according to Barrows Case, 18 Eliz. Dyer, fol. 354.

Against this it was urged, that no notice here is to be given; the Money here by the

the promise, is to be paid ad diem Maritagij, vel infra decem dies post Maritagium; but if notice ought to be given of this, it is sufficient for him to give this in the Declaration, and if notice be requisite, this is then implied in the request made, and here the promise was made by the Father; where the promise was made by a Stranger, there notice is to be given, but needs not to lay this in the Declaration; but where the promise was made by the Father, as here in this Case the same was, no notice is requisite to be given; and this is the difference, for the Law presumes, that he had notice of this, and so this is not to be alledged in the Declaration, if it be no part of the promise; the notice here is no part of the promise, (as it was urged) and the request only implies a notice, this being a notice in it self.

Jones Justice. If one doth promise that I. S. shall pay a Sum of Money to a third person, upon the Marriage-day of I. D. he ought to pay this at his peril.

Coke 6 pars, in Boothies Case, there it appears no difference to be where the payment is to be to the party, and where to a Stranger upon request; a request here is to be laid, but no notice, and here is a request laid, the which implies an absolute notice; here the party hath election to pay this at the day of Marriage, or ten days after; here the same not paid at the day, then the tenth day after was his day of payment; here the request is laid, and that he hath not paid this, and this implies a sufficient notice: As if one be bound to make a Conveyance, such as the Counsel of the other shall advise, and shews in his Action brought for breach, that the Counsel did advise such Conveyance, and that he required him to execute this, and shews not that he gave him notice of the particulars of this.

Coke 6 pars;  
Boothies Case.

In Frances Case, Coke 8 pars, fol. 89. It appears that a request implies all other Circumstances.

Coke 8 pars;  
89. Frances  
Case.

In this Case the Declaration is good, and Judgment ought to be given for the Plaintiff.

Whitlock Justice. The sole point here considerable is, Whether the notice be any part of the promise; as to this nothing can be the substantial part of the Assumpsit, but that which is contained in the Declaration, request is to be made to him, to have him by this to take notice that the Marriage is past, so that the request and notice is all one, and no cause there is to express any notice to be given to him, the request being a sufficient notice of it self, and clearly no notice ought to be here laid in the Declaration.

The whole Court agreed herein, that the Declaration is good, without any notice therein alledged to be given, which needs not to be, and therefore by the rule of the Court, Judgment was given for the Plaintiff.

Judgment for  
the Plaintiff.

Nota, That Hitcham Serjeant le Roy, being present in Court when this last matter was debated, informed the Court, that he had the same day moved the Judges of the C. B. in the like Case, and there it was adjudged by them all clearly in the like Case, and the same question made, that no notice was to be given; but if notice was requisite, then they held also clearly, that the request being made, implied a notice, and was a sufficient notice in it self.

Nota.

Shury Plaintiff, against Brown Defendant.

Entred Termin. Hillar. 20 Jac. B. R.

Rot. 177.

Debt for Rent.  
Larch. 99.  
Bentl. 159.

**I**n an Action of Debt for Rent reserved upon a Lease for years, brought by the Plaintiff as an Assignee of an Assignee: The Case and point rested upon the words of Reservation, the Lease for years was made rendering Rent in this manner, (S) Reddendo inde annuatim, durante termino prædicto, a certain Rent to him and to his Assignees, and dies, Whether his Heir and his Assignee shall have this Rent or not, was the sole point insisted upon for matter in Law.

For the Plaintiff it was urged, that this Rent by the words of the Reservation, shall continue during the whole term, and by the words subsequent, it is sufficiently denoted who shall have the Rent.

27 H. 8. f. 19.

By 27 H. 8. fol. 19. Rent reserved during the term, generally this shall go with the Reversion.

10 E. 4. f. 18.

10 E. 4. fol. 18. by Littleton, A Lease made for years without mentioning of Heirs, because the Heir is to have the Reversion, he shall also have the Rent; so is the Book of 31 H. 8. Dyer, fol. 45. the Lessor and his Heirs shall have the Rent generally, & 6 E. 2. Fitz. tit. Voucher, placito 258. that the Rent reserved shall go to him who hath the Estate, and with this agrees Plowdens Commentaries, fol. 171. in Hill and Granges Case, and Coke 5 pars, fol. 111. Malloryes Case; the reservation in the principal Case, is yearly during the term, to him, and to his Assignees, and this is a sufficient denotation of the person, who is to have this Rent.

31 H. 8. Dyer,  
f. 45. &c.

For the Defendant it was urged, that the Plaintiff here brings an Action of Debt for Rent, as an Assignee; that the Rent here doth not continue, because it doth not appear that John Shury was living, and this is not altered, Pasch. 11 E. 3. Fitz. tit. Assise placito 86. Assise for a Rent, touching the several words of reservation.

Pasch. 11 E. 3.  
&c.

1. Whitlock Justice. The Rent here is to have continuance, being reserved, during the term, and the Heir shall have this, and the reason of this is, because a Lease for years is a contract, and in this, because there is quid pro quo, the Law favours this recompence, (S) the Rent for the Land; and therefore the same is to have continuance during the term; and this is natural equity, & de jure communi, and the Law favours this recompence, this being jus commutativum, which the Law favours. If one makes a Feoffment in fee, and doth not express a use, and consideration, the Law then saith, that this shall be to the use of the Feoffor; here the Law gives a recompence for that which is passed from him; If one makes a Lease, and no reservation of any Rent in it, the Law reserves Fealty for him, and that he shall give his attendance, in 31 H. 8. Dyer, there is a general reservation, and so this left to the construction of Law, Coke 5 pars, in Malloryes Case. A reservation to an Abbot and his Successors, this is good there to both. Commentaries, fol. 171. in Hill and Granges Case. Rent reserved payable at Mich. and Lady-day, and this Lease made in January, he will have the first Lady-days Rent, by construction of Law. In this principal Case here, the contract of the parties is plain, that the Rent is to have continuance during the term, and the Law will uphold this 4 H. 6. fol. 26. to prove that the Rent shall go to the Heir, where it is not reserved to him, by express

31 H. 8. Dyer.  
Coke 5 pars,  
&c.  
Comment. f.  
171. &c.

4 H. 6. f. 26.



press words, and this by reason and construction of Law, and so it shall be here in this Case. And so upon the whole matter, the Rent here continues to the Heir, or to the Assignee of the whole Land, during the term; and that Judgment ought to be given for the Plaintiff.

2. Jones Justice agreed herein for the Plaintiff, that the reservation here shall be to him and his Heirs, and he having aliened the reversion, the Alienée shall have the Rent, 11 E. 3. Fitz. tit. Assise for Rent, placito 86. that the Rent shall go to the Heir, but this is not there resolved in Browning and Bestons Case, in the Commentaries; there the reservation was not during the term, as here in this Case it is, 10 E. 4. fol. 18. and 27 H. 8. fol. 19. An opinion there is upon the point of reservation, in what manner the Rent shall go; and there, fol. 29. some other opinion there is as touching this, and so in 31 H. 8. Dyer. But this Case here, very much differeth from the Case where the reservation is to the Lessor himself particularly; for here in this Case, there is an express reservation of the party himself, durante termino predicto annuatim, to the Lessor, and to his Assigns; but if the same had been reserved, annuatim, to the Lessor during his life, then the same Rent should have had no longer continuance. I ground my opinion this way, upon Hill and Granges Case in the Commentaries. If Rent be reserved, annuatim durante termino predicto, the first payment to begin two years after, this controls the words of reservation. But it is not so here in this Case. If we shall not make such a Construction in this Case, we should then go against two Judgments; the one Coke 8 pars, in Whitlocks Case, and the other, Coke 5 pars, in Malloryes Case; here the Rent is reserved annuatim durante termino predicto; and the limitation of the payment comes afterwards, (S) to the Lessor, and to his Assigns. In Malloryes Case, there it is rendering Rent to him, or to his Successors; this Rent shall not go to the Successors; but there the reservation was, durante termino predicto, the first words carry the Estate, for the reservation, and the other words (or Successors) are void, and so the first words to carry, and to settle the reservation, the other words only for limitation of the payment, for there are no words of reservation, but of limitation of payment; and so in this Case the Plaintiff hath good cause of Action, and so Judgment ought to be given for him.

3. Dodderidge Justice, I will not now deliver any binding opinion in this Case. Conceits are but like unto sparkles of fire. I have viewed all the Books.

As to the general Reason. 1. To the words of demise, they are the words of the Lessor, and so the words of Reservation, are the words of the Lessor, and as he doth demise this, so it shall stand, and as he doth reserve the Rent, so the same also shall be by construction of Law; but if he leaves this to the construction, and to the reservation of Law, then this to go with the Estate, and during this Estate, the same shall have continuance. If he himself do make his reservation too short, he ought to be with this contented, because this is his own Act so to do, & volenti non fit injuria.

In a Reservation there are these three things considerable. (S.)

1. The quantity of the Rent reserved.
2. The person who is to have this, to whom it is reserved; and
3. The limitation of the time when this Rent is to be paid; and all this rests in the limitation, and appointment of the Lessor himself, who doth reserve this.

1. For the quantity of the Rent, this is to be according to that which he himself hath reserved to be paid, as appears by 11 E. 3. & 50 E. 3. where 20 l. was reserved for the last year, and good.

2. As touching the person who is to have this Rent. If this be generally left to the construction of Law, then the Law will speak for him, and will make this Rent to be incident unto the reversion, but if the party speaks for himself and reserves this Rent unto himself, then this Rent shall go no further, nor have any longer

U n

continuance

11 E. 3. Fitz.  
Assise placito  
86. &c.

31 H. 8. Dyer.

Hill and Granges  
Case. Com.

Coke 8 pars,  
Whitlock's case,  
&c.

11 E. 3. & 50  
E. 3.

continuance than according to his own reservation; and shall then have this only during his time.

If two Joint-Tenants do make a Lease for years, rendering Rent to one of them, this is good, and the other shall not have it, neither shall it go with the reversion. Two Joint-Tenants in fee, or for life, the one of them makes a Lease for years, rendering Rent, the other shall not have this Rent, because not privy to the Lease. In this Case here now in question, If Judgment shall be given against the Rent, that the same is not to have continuance; such a Judgment here given, will not any ways hurt the Judgments given in Malloryes, nor in Whitlocks Case. In Malloryes Case, there is no election, the word (or) there taken for (and) there it appears that the Rent was to have continuance, which could not so be, if (or) had not been taken for (and) but the construction there, was not made upon any words of reservation. A Lease for years made, rendering 20 s. Rent annuatim durante termino prædicto, this shall go to the Heir, there being no restraint; for there it is all one, as if the Rent had been generally reserved; but if he had said, rendering Rent to himself, durante termino prædicto, the Rent there by any construction shall not be extended to have any larger continuance, but only to the Lessor himself, who hath so reserved this Rent.

In this Case now in question, if it had been demanded of him, who was to have this Rent? he would have answered that this should be to him, and to his Assigns; and not to his Heir, but he himself to have this, if he should live so long; if not, then his Assignee to have this, if assigned over by him, during the term; & posito, that he assigns this over to one, who assigns it to another, the Assignee of the Assignee shall have this Rent, but not the Heir, where no assignment was made, and so upon the whole matter, the Rent here doth not continue, and Judgment ought to be given against the Plaintiff.

4. Crew Chief Justice. There are concepts transcendent, being rational, and which are grounded upon the reasons of Law, and such are not to be rejected, but very much to be respected.

As to the reservation here, this being annually durante termino prædicto, this is the contract made by the Lessor, to him, and to his Assignees, these are the words; so that by the intention of the parties, the Lessor is to pay his Rent to the Lessor, if he shall live; and to his Assignee, if he dies. As to Malloryes Case, being in Case of a reservation, during the term, the Law gives a favourable construction for the continuance of the Rent, and such construction is to be made in this, and in the like Cases as shall be according to the meaning and intention of the parties, here in this principal Case, the Assignee of the Assignee brings this Action. If a Lease be made rendering Rent annually during the term, to the Lessor, this shall not go unto his Heir, for it shall be intended to be to him, if he shall live so long, but if he dies, during the term, because by his express reservation, he hath fixed the payment upon the Lessor only, this shall go only unto him. But here in this principal Case, the reservation is, rendering Rent annually, durante termino prædicto, to the Lessor, and to his Assignees; so that by this he explains himself, who should have this Rent (S) he, and his Assignees, and this differs from Butchers Case, cited Hillar. 33 Eliz. C.B. Rot. 1116. for there the Heir brought the Action of Debt, and he was excluded by the words of the reservation. And so upon the whole matter, Judgment ought to be given for the Plaintiff.

Butchers Case,  
Hill. 33 Eliz.  
C.B. Rot. 1116.  
Judgment for  
the Plaintiff,

Afterwards Bridgeman Serjeant moved the Court in this Case, to have Judgment for the Plaintiff.

Crew Chief Justice, Jones & Whitlock Justices, Dodderidge absent, were all clear of opinion for the Plaintiff, and accordingly the Rule of the Court was, that if cause (by a time prefixed) was not shewed to the contrary, Judgment to be then entered for the Plaintiff, and no cause being shewed, Judgment was given for the Plaintiff, and execution taken out.

Calfe

*Cafe Plaintiff against Bingley, & Davies, the  
Mainpernors of Hall.*

Entred Termin. Hillar. 22 Jac. B. R. Rot. 951.

**I**n a Scire facias against the Bail, the Cafe appeared to be this. A Judgment was given against Richard Hall, the Principal in B. R. upon this Judgment a Writ of Error brought in the Exchequer Chamber, according to the Statute of 27 Eliz. c. 8. and hanging this Writ of Error, by the procurement of the Bail of Hall, Hall the principal appeared, and rendered himself in discharge of his Bail, hanging this Writ of Error, a Scire facias was brought against the Bail, who pleaded in discharge of this, that after the Writ of Error brought, and hanging this, the Principal reddidit se in exoneratione balliorum, and also that before the Scire facias brought, and before the Writ was determined, and hanging this, the Principal dyed; unto this Plea of the Defendants, the Plaintiff demurred in Law.

*A Scire facias  
Stat. of 27 El.  
cap. 8.  
Jones 138.  
Litch 148.  
Poph. 183.  
Ben. 184.  
Noy 82.*

The Question was, whether this be a good Plea, in discharge of the Bail, and whether after all this, the Plaintiff may resort again unto the Bail by a Scire facias.

It was urged for the Plaintiff, that this Plea was not good, being double, the same having two matters issuable in it, as 1. the render of the body of the Principal, and the second, the death of the Principal, before the Writ of Error determined.

Jones Justice. In a Writ of Error, the tenor of the Record is sent away, but the Record it self remains here, vide the Statute of 27 Eliz. which gives the Writ of Error in the Exchequer Chamber; upon a Judgment given here, by the Writ of Error, the virtue and efficacy of the Record is suspended, and in Judgment of Law is no Record, until the Judgment be reversed, or affirmed, as appears 6 Eliz. Dyer fol. 227, 228.

*6 Eliz. Dyer,  
f. 227, 228.*

Curia, Whitlock & Jones Justices being only present, and clear of opinion, that the Bail is by this discharged, and that he cannot after all this, resort unto the Bail. As to the render of the principal, hanging the Writ of Error, reddidit se prisonæ, this he may well do, and this is to be entered of Record, and there ought also to be a committitur by the Court, and this is triable by the Record, but he cannot be in execution, as long as the Judgment remains undetermined, by the Writ of Error; during this time, the party cannot pray him in Execution, neither can the Court grant him to be in execution, because that all the proceedings are suspended, hanging the Writ of Error, but he remains in Custodia Mariscalli, to be taken in execution, after the Writ of Error determined, if Judgment be affirmed: and if the party will not then pray him to be in execution, the Court will then discharge him.

Nota, that all the Clerks and Attourneys, for the course of the Court said, and informed, that hanging the Writ of Error, the Principal may render his body in execution in discharge of the Bail, because the Record of the Writ is a distinct Record of it self, and that a Scire facias might be brought against the Bail, pendente the Writ of Error, quod non est lex, the opinion of the Judges for point in Law being against them.



Whitlock Justice. The point here is, whether hanging this Writ of Error, the Principal may render himself prisoner, in discharge of his Bail, or not, whether he may waive the benefit which the Law hath given unto him by the Writ of Error.

It hath been objected, that the Principal may render himself in execution, in exoneration of his Bail. As to this he cannot be in execution, pendant the Writ of Error.

Jones Justice agreed with him herein, For that the Writ of Error, is a suspension of the Judgment, and the party cannot be in execution so long as the Judgment by the Writ of Error remains undecided; the same being by this suspended; also if the party do not pay him in execution, the Court will then discharge him.

Whitlock Justice agreed herein, the sole point here considerable is, how, for there may be a render by the Principal of himself, after the Writ of Error brought, and hanging the same.

Jones Justice. When I was in the C. B. this was then there in question, whether by a Scire Facias the party might resort to the Bail, after a Writ of Error brought, and there this point was then left as a question not resolved. But I am of opinion, that he cannot in such a manner resort unto the Bail, by a Scire Facias, after the Writ of Error brought, for by this Writ of Error, upon the Judgment here given, there is a stay of execution, until the Judgment be affirmed or disaffirmed.

When I was in Ireland, a Judgment was there given before me, and a Writ of Error brought here upon this Judgment, and the tenor of the Record sent hither, and afterwards the Judgment was affirmed, I then did doubt whether I might proceed there to give Judgment, because the tenor of the Record was here in B. R. I put this question here to the Judges, to have their Resolution herein, they did all here resolve, and sent me their resolutions in this, that I might well there proceed to give Judgment, which was so done accordingly.

In this principal Case, Curia, (S.) Jones & Whitlock being only present, after the Writ of Error brought, and hanging this, the principal rendering of himself, cannot be prayed in execution, neither can the Court grant him to be in execution, because that all the proceedings in this matter, are now suspended by the Writ of Error brought, and hanging the same. And so without any further debate at this time (the Court not being full) the same was adjourned to a further time, to be moved again in full Court.

Term. Trin.  
2 Car. R. B. R.  
this matter  
moved again.

Afterwards, (S) Termin. Trinit. 2 Car. Regis B. R. this matter was moved again, and much debated.

Jones Justice. The Bail may bring in the principal, at any time before the Judgment affirmed, but he shall not be prayed to be in execution, until the Judgment be affirmed or disaffirmed; but he shall remain in Prison in custody, until this be done.

Crew Chief Justice. Hanging the Writ of Error, the Bail may bring in the body of the Principal, at any time, when he will, but he shall not be prayed in execution, before Judgment be affirmed or disaffirmed.

Hobbs Case.

Jones Justice. It was held in Hobbs Case, that though a Capias be against the Bail yet he may bring in the body of the Principal, at any time, before the Judgment be affirmed. The Bail is not chargeable before a Scire Facias brought against him. There ought to be a Capias against the Bail, before he is to charge him, and if the Principal dies before the Scire Facias, the Bail by this is discharged, and this by the Act of God.

The Court was clear of opinion in this, that the Bail was not to be charged, but by a Scire Facias first had against him, and if before the Scire Facias, the Principal dies, the Bail shall be discharged, as here in this principal Case.

The

The Court was also clear of opinion, that the Bail may bring in the Body of the Principal at any time. But to charge the Bail, there ought to be shewed, That the Capias was returned, and filed against the Bail.

The Court was clear of opinion in this Case against the Plaintiff, that he cannot have a Scire Facias against the Bail, after a Writ of Error brought, and hanging the same; and therefore the Rule of the Court was, that if the Plaintiff shewed not better cause the next Term, Judgment then to be entered against him.

Afterwards, (S.) Term. Mich. 2 Car. R. B. R. this Case was moved again, and argued at the Bar, and after by all the Judges, and at last adjudged against the Plaintiff. Termin. Mich. Car. B. R. & c.

Crew Chief Justice. It remains doubtful, whether by the rendering of himself, he shall be in execution, or not, reddidit se in exoneratione manucaptorum suorum, the Principal here dyed, breve de errore tunc pendente indiscusso, he dyed before the Return of the first Scire Facias, there being no Capias at all.

Dodderidge Justice. If you will have execution, you ought then to shew all things to enable you to have execution, to shew whether there was any Capias, or not, here there was none.

Crew. The condition is double, to render himself, or to pay, &c. No Capias here, but a Scire Facias against the Bail, before the return of it, the Principal renders himself, and hanging the Writ of Error dies, the Bail by this discharged.

Jones Justice. The Bar here is not double, here the Principal may render himself, before Judgment, and this is good, but yet not to be in execution, until after Judgment, and a prayer to have him to be in execution, but in the interim, the Marshal may have him in his Custody, but he cannot be in execution, hanging the Writ of Error undetermined.

As to the Plea here of the Defendants, the same is good, and not double, as it was objected.

As touching the Principals rendering of himself, and the time when he may so do. In these Cases, the same came to be questioned between Styles and Seager in the C. B. when I was there, & 43 Eliz. B. R. between Hobbs & Doncker, there questioned, whether upon a Judgment given, the Principal, to render himself presently, or not until a Capias. Styles & Seager's Case, C.B. &c.

There Resolved, That he is not to render his body until a Capias brought, and returned against him, and that if the Principal dies before this be done, the Bail is discharged, and this so agreed there by all.

And so was the Case also in the C. B. where agreed, that if the Principal dyed before any Capias had, and returned, there resolved, the Bail by this is discharged, so that none can fall upon the Bail, until a Capias, and if the Principal dies before the Bail is discharged; and if there was any Capias, this ought to come on the Plaintiffs part, to shew this to be so, and that the death of the Principal was after the return of the Capias, and this to be shewed by him, by way of Replication, but this he hath not done.

Dodderidge Justice. The Plea here is not good, but he proceeds, and shews the death of the Principal, before the return of the Scire Facias.

Crew. The act of God here hath discharged the Bail.

Dodderidge. A Capias is first to be awarded, and no Scire Facias to be against the Bail, before a Capias had, and returned against the Principal. A Capias is first to be taken against the Principal, and upon a Return made of Non est inventus, then a Scire Facias, to be against the Bail, but not before, for you cannot charge the Bail, before a Capias had against the Principal, and the Bail may bring in the body of the Principal, but no such matter here appears, which should have been shewed by the Plaintiff, to have enabled him, to have had execution against the Bail, No Capias being at all here shewed to be had. Also if you have here a Judgment, and upon

upon this you will have Fieri Facias, or an Elegit, by this you have made your election, and you shall never now charge the Bail.

Whitlock Justice. The Bail here are to be discharged.

The whole Court in this Case agreed clearly against the Plaintiff, and that first there ought to be a Capias against the Principal, and upon a Non est inventus returned, then a Scire facias to be against the Bail, but not before, and so upon the whole matter, the Rule of the Court was, quod querens Nil capiat per Billam.

Judgment quod querens nil capiat per billam.

Harrison Plaintiff against Rock Defendant.

Entred Termin. Trinit. 1 Caroli Regis B. R.

Rot. ---

Action upon the Case for stopping a way.  
Larch. 110.  
Ben. 160.

**I**n an Action upon the Case for stopping of a way, ad dampnum 40 l. which way the Plaintiff claimed by Prescription: A special Issue joyned upon the place where the disturbance was laid to be, a Verdict was given for the Plaintiff.

It was moved for the Defendant in arrest of Judgment, that the Declaration was not good, and divers exceptions taken.

First Exception, because it is shewed that one Willson was seised of the House in Sturbridge, and that he, and all those who, &c. time out of mind have used to have a way, without shewing that this was Antiquum Messuagium.

Second Exception, because it is not shewed in certain, where this way is, nor how this way goeth.

Third Exception, because it is not laid in what Town this way is.

Fourth Exception, because it is not shewed what manner of way this was, whether appendant, or &c.

This Case was argued at large, and in part resolved the last Term, but because it was then upon the first Argument, &c.

Dodderidge Justice somewhat differing in opinion from the rest of the Judges, for this cause no Judgment was then given, but the cause was adjourned until this Term, to be opened and argued again.

Bridgman Serjeant and Wild, moved for Rock in arrest of Judgment, Littleton & Trotman for the Plaintiff to have Judgment.

Whitlock & Jones Justices maintain their former opinion the last Term, that the Declaration is good and sufficient, notwithstanding the Exceptions taken to it, and that Judgment ought to be given for the Plaintiff.

Dodderidge Justice. The Declaration here might have been better, but as the same now is, it is good and sufficient, and the matter now rests upon the Verdict.

As to the first Exception taken, because he doth not say that it was Antiquum Messuagium, as it is in 6 E. 6. Dyer fol. 70. in Ithams Case, where he ought to say, that it was Antiquum parcum, or not good, as it is there resolved; there it is laid, if the Park be ancient, then it follows an ancient Parker there to be.

If one prescribes, that Land is devisable in a Borough, he ought to say that it was an ancient Borough, by 7 E. 4. fol. 6. 15 E. 4. fol. 14. 7 H. 6. fol. 32. touching the return of the Sheriff, in a Natio habendo, to say, Quod Civitas London est antiquissima Civitas, 22 H. 6. Fitz. Prescription, pl. 57. 21 E. 4. fol. 54. & Coke 4 pars, in Lutterels Case: If one prescribes for Cistovers, he ought to alledge, that it was an ancient House, and that time out of mind used to have them.



But as this principal Case here is, he needs not to alledge that the *Pessuage* fuit antiquum *Messuagium*: There is a way which may be appendant and incident: If the way be claimed, as belonging to the said House, there it is appendant, and he ought to plead, that the House est antiquum *Messuagium*, or not good; but the same is not so here, being only that he hath had a way, so that this way is not claimed as incident to the House, but the House is only terminus a quo, and so upon this difference, all the Books may be well reconciled, and so are all the Presidents.

But where this way is claimed as belonging to the House, there the same is incident and appendant unto it, and there he ought always to say that the House was antiquum *Messuagium*; but here he claims the way only from the House to the Close and Meadow, so that the *Pessuage* is here named only, ut terminus a quo, and not as belonging, or as incident to it; and upon this difference, upon view of the Facts and upon the pleading of this Case, I am of opinion, that in this Case as it is here pleaded, the Plaintiff ought not to plead that this House was antiquum *Messuagium*, because that the way, by the pleading, is not laid to be belonging, nor yet incident to the House.

As to the second matter, he sheweth this particular way how it leadeth, but gives no name unto it, as by 39 H. 6. fo. 6. he ought to have named the way in pleading of it; But here, we are in case of a private way: The Declaration, as to this, might have been better, but as it is, it is good and sufficient; for here he makes no use, nor yet lays any prescription in the way, but he doth use this, and names this only to bring him to his private way, the which is laid to lead to such a Bridge; a private way is an ease to the party who hath it, and a charge and burthen to the other, and therefore when he comes to his private way, in pleading he ought to make and lay this certain; here it is laid to be proper such a cross, this is not good; but here the Jury have found this way for the Plaintiff and so this verdict hath aided all other imperfections, and so upon the whole matter, the Declaration is here made good by the verdict, and so Judgment ought to be given for the Plaintiff.

Crew Chief Justice agreed herein, that the Declaration is good, and that the verdict here hath aided and made good all the imperfections in the Declaration, if any be; there will be a difference between a Custom of a place, and a prescription. In case of Custom you ought to say in pleading, antiqua Civitas & antiquum *Messuagium*, but in case of a prescription, which is personal, otherwise it is; the difference before put is very probable, where the way is laid to be belonging to a *Pessuage*, and where not; but the *Pessuage* is named only, ut terminus a quo, the way to be; here the inference is very forcible, and of great relation, for he cannot have a way time out of mind, from the said *Pessuage*, if the *Pessuage* was not antiquum *Messuagium*, as by 6 E. 6. Dyer fol. 70.

As to the Presidents, I have viewed some of them in the Book of Entries, in tit. Trespas, and there he is not to say, antiquum *Messuagium*: This Declaration here is good and certain, but it might have been better; but the verdict here hath made all good.

The whole Court agreed, that the Declaration here is good, and sufficiently certain, notwithstanding the Exceptions taken against it, all which the Court overruled, that the Plaintiff had just cause of Action, to have satisfaction for the wrong done him, and having a verdict, he ought to have his Judgment, and accordingly by the rule of the Court, Judgment was given, and so entered for the Plaintiff.

Judgment for  
the Plaintiff.

Mouniford

Mountford Plaintiff, against Sidley Defendant.

Entred Termin. Hillar. 22 Jac. B. R.

Rot. 312.

Trespas.

**I**N an Action of Trespas, for the taking of thre Loads of Dats, the Defendant in Bar avows the taking, for damage feasant, being upon his Land, he having a Lease of this Land made unto him, by one Beckington, the place called Herles Close, within the Parish of Tawen. The Plaintiff replies, and agrees the Lease to be so made to the Defendant, but saith, that he was Parson of the Parish of Tawen, and that the Dats were there set forth for him, for Tithes, and that he took them.

The Defendant Rejoyns, and takes by Protestation, that they were not set forth for Tithes, and for Plea saith that Sidley did not demise to Hawks for one year (who as the Plaintiff supposes) did sow the Land, and set forth the Dats for Tithes, and doth travers the Lease made by Sidley to Hawks for one year; upon this Travers the Plaintiff demurs in Law.

Whitlock Justice. That the Travers here is not good, and upon consideration had of the whole matter, Judgment ought to be given for the Plaintiff; the Defendant here hath admitted, that the Plaintiff was Parson, and hath also admitted, that the Cozn was set out for Tithes, and the Defendant took them. The Case is no other than this, That Cozn is set forth for Tithes, and the owner of the Land takes this as for damage feasant without making this to appear in pleading, (as he ought to have shewed) that the Parson had suffered the Cozn to remain overlong upon his Land to his damage. The Parson might have an Action of Trespas for the taking away, if once they were set out for Tithes, and after taken away. The Defendant here disclaims in any title, or property unto the Cozn, he claims nothing in it, but he admits the Plaintiff to have the sole property; where he distrains for damage feasant, he ought here specially to shew that the same remained there so long, so that by this, there was a damage to him, and lawful it is in such a Case to distrain Cozn in Hocks, but not so for Kent, and so the difference is taken.

10 H. 7. 21 H. 7. 10 H. 7. 21 H. 7. and 22 E. 4. fol. 50. As to the Travers here taken, this is not a material Travers, and so for this cause not good, the same being (absque hoc) that Sidley had demised unto Hawks for one year, this is no way at all material. If he had said, absque hoc, quod possessionatus fuit, and sowed. He needs not to take notice of his title, in an Action upon the Statute of 2 Ed. 6. for not setting out of Tithes; he is not to lay, and set forth a title in the Defendant, but only, that he was possessed, without shewing any title, and this is sufficient; here the Defendant by his Travers, admits the Plaintiff to be Parson, so the Travers is not good, and Judgment ought to be given for the Plaintiff.

2. Jones Justice. It doth not appear here, whether the Plaintiff hath brought his Action, as Parson, or otherwise, and therefore the Defendant may well plead in Bar, the Parson ought to make his title; the Parson, where Tithes are set out, hath a liberty for a time convenient to come and carry them away, and this convenience of time, is tryable by a Jury: and this is a Licence which the Law gives unto him, and if he exceeds this, he shall be subject to an Action; and then by the Judgment of Law, he shall be taken for a Trespassor, ab initio, otherwise it shall be of a Licence in fact, given by the Parson himself; if he exceeds this, no Action of Trespas

Trespas lyeth for this, but an Action upon the Case, and this difference is taken.

Coke 8 pars fol. 146. in the six Carpenters Case. If an Action is brought for taking away of Tithes, the Defendant ought to plead specially, (S.) either that they were not set out for Tithes, or else being set out, they were suffered to remain there over-long, here the Parson makes his Title in his Replication. As to the Travers by the Defendant, of the demise to him, who set out the Tithes, this is a bad and an impertinent Travers. If one, who hath some colour of Title, sows the Land, and sets out the Tithes, though this be by a Disseisor, this is good for the Parson; otherwise it is, where one without any colour sets out Tithes, this is no setting out in Law; here the Travers being of a particular inducement to the Title, is not good, and so the Travers here is bad, and Judgment ought to be given for the Plaintiff.

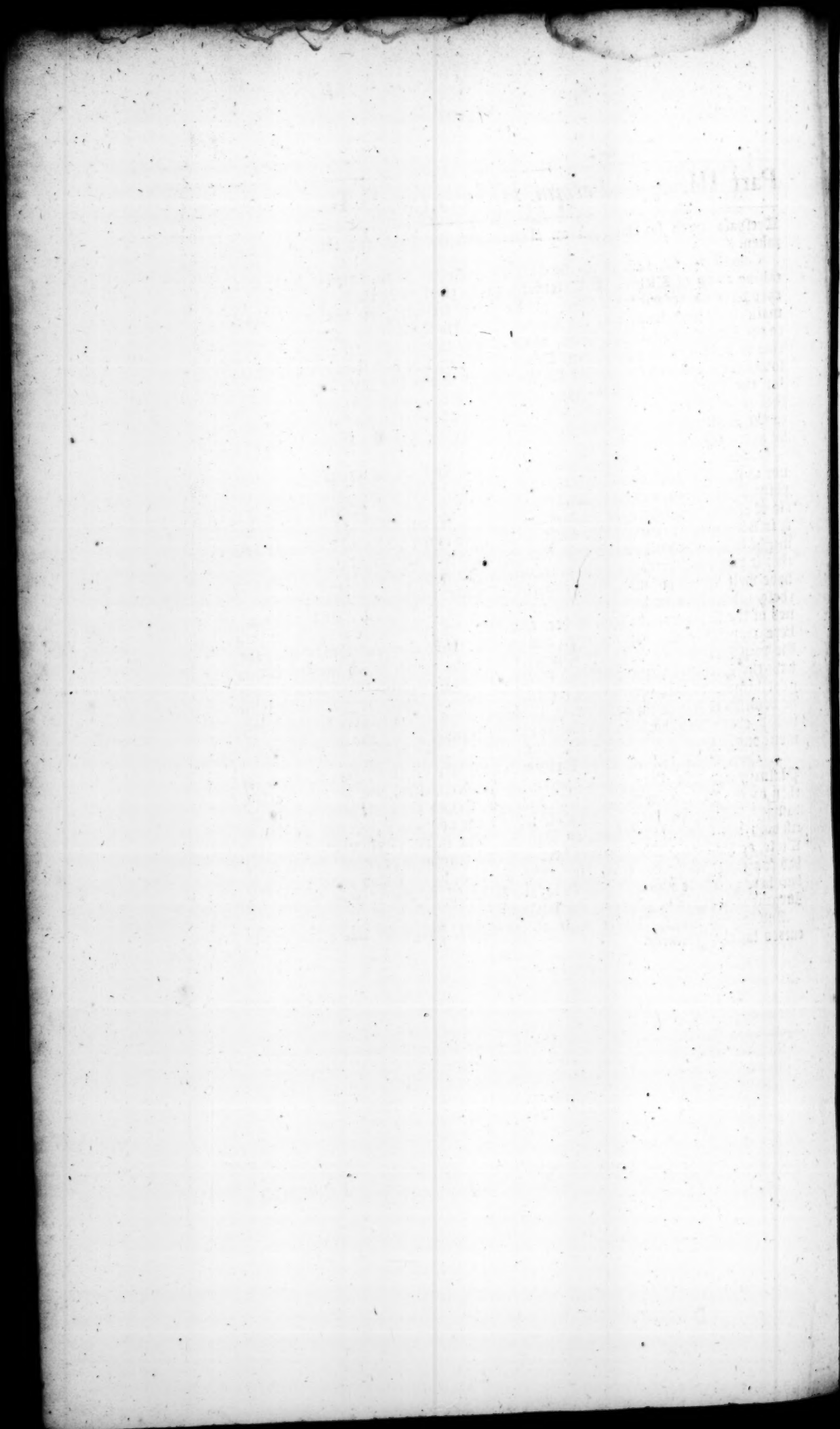
Dodderidge Justice. The Travers here is bad, both for the matter and the manner of it. As touching a Travers, this thing is to be traversed, which goes to the point of the action, any other Travers is not good, because not material, to the Title of the Plaintiff here, be the demise to Hawks, for one year, or for half a year, it is not material; and for this cause the Travers is not good: the Defendant here might have said that he was not Parson, or that it was not within the Parish. Or 3. that it was not severed from the nine parts; If any of these so be, the same would have well served his turn, and a material Travers might have been upon any of these. But here he hath traversed a thing merely immaterial. As to the manner of the Travers, the same is here also void, for the manner of it, for he hath here traversed a Conveyance only, and no other thing else, and this is not good. He doth here travers only the Conveyance to the Title, which enables him to have the Tithes, and therefore this Travers is not good. Also, this Travers is not good, because he hath here taken a captious Travers, the same being absque hoc, that he demised to Hawks for one year, so that upon the whole matter, the Travers here is bad every way, both for the matter and the manner of it; and therefore Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice. The Defendant hath here allowed a good Title in the Plaintiff unto the Dats. If it appears by the Declaration, that he was Parson, then by the Bar, he ought of necessity to have shewed the cause of his taking for damage feasant, but here, as this Case is, he needs not to do it, because the Plaintiff doth not bring this Action, as Parson. But in his Replication, makes his Title, as Parson. The Travers here of the Defendant is not good. If the Corn had continued there over-long, his remedy had been, by his Action upon the Case, but here no Title appears but only for the Plaintiff, so the Travers is bad, and Judgment ought to be given for the Plaintiff.

And so accordingly, by the Rule of the Court, Judgment was given, and so entered for the Plaintiff.

Judgment for  
the Plaintiff  
per Curiam.





# Termino Paschæ,

2 Car. Banco Regis.

*Shury* Plaintiff against *Piggot* Defendant.

Entred Termin. Hillar. 1 Car. B. R.

Rot. 124.

**I**n an Action upon the Case, for stopping of a Water-Course, which had used to have its current from such a place, through such a place, and so to come into the Plaintiffs yard, and there to fill and supply a Pond with water, for the necessary watering of his Cattel, that the Defendant hath erected a Stone-wall, and so hath stopped this, that the Plaintiff wanted his water, and was by this dampnified.

An Action upon the Case Poph. 166. Jones Rep. 145 Latch. 153. Noy 84 Ben. 180

The Defendant pleaded in bar, a unity of possession in the Land of the House, and place to which, and of the Land through which, and of other Land, of which, &c.

The only question moved, and insisted upon was, Whether this unity of possession will extinguish this Water-Course or not.

This Case was argued at the Bar, and much debated, and for further argument, the same was adjourned to another time.

Afterwards, (S.) Termin. Mich. 2 Car. R. B. R. this Case was moved again, and urged, that by this unity of possession, the Water-Course is not extinguished; and for this purpose, Coke 4 pars Terringhams Case, 14 H. 4. fol. 7. profite apprender extinct by unity. 21 E. 3. fol. 2. a way extinct by unity. 35 H. 6. fol. 55, 56. a Warren not extinct by unity, he may hawk in his own Land. 16 Eliz. Dyer fol. 326. 13 Eliz. Dyer fol. 295. 11 H. 7. fol. 25. the Case of the Cutter not extinct by unity, as it was urged. Termin. Hillar. 36 Eliz. B. R. Rot. 1332. a Case between Herneden and Crowch, was urged, that service of inclosure extinct by unity, and 39 Eliz. Harringtons Case was urged, in which it was adjudged, that service of enclosure shall be extinct by unity of possession, and not to be afterwards revived.

Term. Mich. 2 Car. R. B. R. this Case moved again. Coke 4 pars. Terringhams Case. 14 H. 4. f. 7. &c

Hillar. 4 Jac. B. R. Jourden against Atwood, the Case of a Way adjudged, to be extinct by unity, as it was urged, and not to be revived. 24 E. 3. fol. 25. Common extinct by unity.

Jourden & Atwoods Case. 24 E. 3. fol. 25.

11 H. 4. fol. 5. A way extinct by unity.

Dodderidge Justice. If I have a Mill, and a Water-Course unto it, he sells the Land, he shall not stop the Water, being matter of necessity, and not like unto the Case of the way; therefore not to be extinct by unity, because of necessity, and the same hath a continuant running.

The Reason of the Case of enclosure urged is, because the prescription there was interrupted, and therefore all gone, and extinct, and so it was adjudged, 3 Jac.

3 Jac.

The whole Court at this time seem'd to be clear of opinion, that the Water-course here, was not extinct, by the unity of possession, there being a great difference between this Case, and the Case of the way.

Whitlock Justice. The Course of a Spring, is a natural Course, and current, and to stop this, may be a Nuisance to the Common-Wealth, and a private wrong.

Term. Mich.  
2 Car. R. B. R.  
this Case argued by the  
Judges.

Afterwards this Case was argued at large by all the four Judges, Term. Mich. 2 Car. R. B. R. who all agreed in opinion, that Judgment ought to be given for the Plaintiff, and that the Water-Course in this Case, is not extinct, by the unity of possession.

1. Whitlock Justice. There is a difference between a Way, a Common, and a Water-Course. Bracton lib. 4. f. 221, 222. calls them servitudes prædiales, these which begin by private right, by prescription, by assent, as a way common, being a particular benefit, to take part of the profits of the Land; this is extinct by unity, because the greater benefit shall drown the less; a Water-course doth not begin by prescription, nor yet by assent, but the same doth begin ex jure nature, having taken this course naturally, and cannot be altered.

2. Jones Justice. This Water-Course is not extinct by the unity of possession, the same being a thing which ariseth out of the Land, and no interest at all, by this claimed in the Land, but quod currere solebat this way, and so to have continuance of this.

3. Dodderidge Justice agreed herein, That this Water-Course is not extinct by the unity of possession.

1. Because the nature of this is to be current.

2. Because it is also a thing of necessity, for the watering of Cattel, and a thing which of necessity is to have continuance, the same not to be extinct by a unity of possession, as common appendant to arable Land, for Cattel of the Plow, and because appendant unto ancient arable Land, (S.) Hyde & Gaigne, to be only for Cattel (S.) Chivalrs & Beotes, for to plow the Land, and for Hine, and Sheep, for to compester the Land.

As to the Case of Ways, if they are private Ways, they are extinct by unity of possession, but not so, if they be Ways of necessity; as to the Church, or to the Parson, and so was Pophams Opinion in his time, upon this difference, where a Way shall be extinct, and where not, by a unity of possession.

The Case of the Water-Course is upon the like Reason.

11 H. 7. fol. 25.

11 H. 7. fol. 25. A notable case there of the Cutter, the reason there given, because matter of necessity, where one had a Cutter running within the Tenement of another; both purchase the Tenement, the Cutter remains, not extinct; this being as necessary as it was before.

2. Another Reason may be drawn from the nature of Water, the which will naturally descend, and will make a Way, for its passage, if stopped; it is not possible to have such to be extinct by a unity of possession.

Coke 4 pars.  
Luttrells Case,

Coke 4 pars Luttrells Case of the Mill, and the Case of the Dyehouse, no Mill nor Dyehouse can subsist without Water.



Crew Chief Justice agreed herein, that this Water-course is not extinct by the unity of possession; this Case differs from the Case of way, and common appendant.

Coke 4 pars fol. 38. in Tiringhams Case. 3. Resolved, that a common appendant is extinct by a unity of possession; and so it is, of every profit, which one hath fol. 38. &c. out of land, and so is 24 E. 3. fol. 25.

The whole Court agreed in the principal Case, that the Water-course was not extinct by the unity of possession; and accordingly by the Rule of the Court, (the Defendants Plea in Bar being not good) Judgment was given for the Plaintiff. Judgment for the Plaintiff.

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F I N I S.

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An



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Part III.

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An Alphabetical

T A B L E

Containing the several

Heads and Points in Law,

That are Controverted and Adjudged in this Third PART.

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